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TRAGEDY IN EAST TIMOR

Report on the Trials in Dili and Jakarta

International Commission of Jurists
26 Chemin de Joinville
Ch - 1216 Cointrin/Genève
Switzerland - Suisse

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Abbreviations and Terms

ABC	Australian Broadcasting Corporation
ABRI	Angkatan Bersenjata Republic Indonesia, Armed Forces of the Republic of Indonesia
ACFOA	Australian Council for Overseas Aid
Barkas Perkara	Compilation of evidence relied on by the government in prosecuting the defendants.
BRIMOB	Paramilitary Police Mobile Brigade
CE	Comité Exécutif (Executive Committee)
CNRM	Concelho Nacional de Resistencia Maubere (National Council of the Maubere Resistance)
CRNJR	Resistance Committee for Timorese Youth
Dakhura	Joint forces team of troops
FEER	The Far Eastern Economic Review
FITUN	A resistance group of unknown origin
FRETILIN	Frente Revolucionaria Timor leste Independente (Revolutionary Front of Independent East Timor)
ICJ	International Commission of Jurists, Geneva, Switzerland
IKADIN	One of Indonesia's two bar associations
INTEL	Indonesia Intelligence Service

KOREM	Regional Military Command
Kotis	a special operations group of the army in East Timor
KUHAP	Kitab Umdang-Umdag Mukum Acara Pidana (Indonesian Code of Criminal Procedure)
KUHP	Kitab Undang-Undang Hukum Pidava (Indonesian Penal Code)
LBH	Yayasan Lembagga Bantuan Hukum Indonesia (Indonesian Legal Aid Foundation)
MPR	Majelis Permusyawaratau Rakyat, the assembly with the highest policy-making authority under the guidelines of the policy of the state.
Pancasila	Indonesia's State ideology
PETRUS	mysterious shootings
POLWIL	Polisi Wilaya, regional police force
RENETIL	Resistencia Nacional das Estudiantes Timor Leste
SGI	Dili Intelligence Group
UDT	Uniao Democratacia Timorense (Timorese Democratic Union)

PREFACE

On 12 November 1991, Indonesian Security Forces killed more than 50 unarmed civilians at a cemetery in Dili, East Timor. They were marching to the grave of a young Timorese man killed by security forces on 28 October 1991.

The Government of Indonesia, on 18 November 1991 appointed a National Commission of Inquiry to investigate all aspects of this incident. The Commission concluded " ... a spontaneous reaction took place among the security personnel to defend themselves, without command, resulting in excessive shooting at the demonstrators, causing deaths and injuries. At the same time, another group of unorganized security personnel, acting outside any control or command, also fired shots and committed beatings, causing more casualties."

Thirteen East Timorese were prosecuted for their roles in the demonstration of 12 November in Dili and a subsequent demonstration held in Jakarta on 19 November to protest the shootings in Dili.

The trials of eight defendants in Dili began on 12 March. Francisco Miranda Branco and Gregorio Da Cunha Saldanha were charged with violating Indonesian's subversion law, a capital offence. The other six defendants —Jacinto Des Neves Raimundo, Filomeno da Silva Pereira, Juvencio de Jesus Martins, Carlos Dos Santos Lemos, Bonafacio Magno and Saturnino da Costa Belo — were charged with spreading hatred and enmity towards the government (under articles 154 and 155 of the Indonesian Penal Code) for which the maximum penalty is seven years in prison.

The five defendants who were tried in Jakarta were Fernando de Araujo, Joao Freitas da Camara, Virgilio da Silva Guterras, Agapito Cardoso and Dominggus Bareto. The first two were charged with subversion and the rest under articles 154 and 155 of the Indonesian Penal Code.

The International Commission of Jurists (ICJ) sent observers to the trials in Dili and Jakarta. The observer at the trials in Dili, Mr. Rodney Lewis, a Solicitor of the New South Wales Supreme Court, Australia attended the opening stage of the subversion trials in Dili. Justice Xavier Connor, a former Judge of the Federal Court of Australia, who was to observe the concluding stage of the trials in Dili, had his visa application denied upon the basis that by the time the authorities had approved it, the subversion trials would have been concluded.

The ICJ would like to thank all those who assisted the observers both in Jakarta and Dili. In particular we would like to thank Dr. Alison Murray who assisted with the translation work. We also are very grateful to Mr. Rodney Lewis who prepared a substantial part of the report.

Geneva, August 1992

Adama Dieng
Secretary-General

WHEREAS IT IS ESSENTIAL, IF MAN IS NOT TO BE COMPELLED TO HAVE RECOURSE, AS A LAST RESORT, TO REBELLION AGAINST TYRANNY AND OPPRESSION, THAT HUMAN RIGHTS SHOULD BE PROTECTED BY THE RULE OF LAW.

(from the Preamble, Universal Declaration of Human Rights)

INTRODUCTION

This is a report about the trials which followed the events in which dozens of people were shot at the Santa Cruz cemetery in Dili, East Timor on 12 November 1991. A report on the Santa Cruz incident and its immediate aftermath (including the establishment of the National Commission of Inquiry by the Indonesian Government) has been published by the International Commission of Jurists (ICJ).[1]

Integration and Self-Determination

East Timor was a colony of Portugal from 1520 to 1975, a period of 455 years. In 1975 there were political discussions both within and outside East Timor which were part of a process of decolonization begun by the new government of Portugal in 1974. As might have been expected for a people from whom the right to self-government had been withheld for 455 years, the process of decolonization was painful, confused and ultimately violent. A civil war ensued between the rival factions, notably the UDT forces [2] and FRETILIN. [3]

On 28 November 1975, FRETILIN issued the following declaration:

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[1] "Blaming the Victims: The 12 November 1991 massacre in Dili, East Timor and the Response of the Indonesian Government", *International Commission of Jurists*, February 1992.

[2] Uniao Democratica Timorense (Timorese Democratic Union), a political grouping which was pro-Portugal and favoured some form of closer links with it.

[3] Frente Revolucionaaria Timor Lest Independente (Revolutionary Front of Independent East Timor), formed in May 1974 which favoured and advocated complete independence.

> "Expressing the highest aspiration of the people of East Timor and to safeguard the most legitimate interest of national sovereignty the central committee of FRETILIN decree by proclamation, unilaterally, the independence of East Timor, from 00.00 today declaring the state of the Democratic Republic of East Timor, anti-colonialist and anti-imperialist. Long live the Democratic Republic of East Timor! Long live the people of East Timor, free and independent! Long live FRETILIN!"

On 30 November 1975, the remaining political parties in East Timor in a joint statement in the town of Balibo also proclaimed independence and simultaneously, integration with Indonesia.

On 7 December 1975, a large number of Indonesian troops landed in Dili harbour with a fleet of some 20 naval vessels, a military action which prompted a quick response from the United Nations. The General Assembly of the United Nations adopted a resolution critical of Indonesia and the Security Council resolved unanimously that Indonesian forces should be withdrawn and reaffirmed the right of East Timor to self-determination. It is salutary to recall that on 17 June 1974 the then Foreign Minister of Indonesia, Mr. Adam Malik, wrote to FRETILIN's Jose Ramos Horta in the following terms:

> "The Government of Indonesia until now still (sic) adheres to the following principles:
>
> (a) The independence of every country is the right of every nation with no exception for the people in Timor....
>
> (b) For this reason whoever will govern in Timor in the future after independence, can be assured that the Government of Indonesia will always strive to maintain good relations, friendship and co-operation for the benefit of both countries...." [4]

Ten days after the landing in Dili of the Indonesian armed forces on 7 December 1975, a provisional government of East Timor was established. A little over a month later a representative of the United Nations, Mr Winspear Guicciardi, visited East Timor and talked with a number of political and community leaders. On 2 April 1976, the East Timor People's

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[4] Reproduced in "East Timor, Nationalism and Colonialism", Jill Jolliffe, University of Queensland Press, St. Lucia, 1978, at p. 66.

Representative Council was formed, its members elected in traditional manner based on a form of consensus. On 31 May 1976 at a plenary session of the Representative Council, its members adopted a petition calling for the immediate integration of East Timor with Indonesia. That session was attended by the diplomatic representatives of seven countries.

On 7 June 1976, an East Timorese delegation presented a petition to President Suharto in Jakarta urging the government of Indonesia to accept and legalize integration without a referendum. On 24 June, an Indonesian delegation led by the Minister for Home Affairs visited East Timor in order to ascertain the wishes of the people as described in the petition. After reporting to President Suharto the government submitted a bill to the Indonesian parliament legalizing the integration of East Timor. That bill was passed into law on 17 July 1976 thus establishing East Timor as the 27th Province of the Republic of Indonesia.

Much has been said and written about the events which have resulted in the incorporation of East Timor into the Republic of Indonesia.[5] Professor Clarke has argued that the Indonesian invasion and occupation of East Timor violates two fundamental norms of international law. Firstly, it was a denial of the right to self-determination and secondly, the military intervention constituted an act of aggression forbidden by the United Nations Charter and customary law. These charges are of course disputed by Indonesia.

The General Assembly of the United Nations has set forth relevant guidelines in GA resolution 1541 (XV) which in part provides that:

> "(a) The integrating territory should have attained an advanced stage of self-government with free political institutions so that its peoples would have the capacity to make a responsible choice through informed and democratic processes.
>
> (b) The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through

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[5] For example, *see*, "The De-Colonisation of East Timor and the United Nations Norms on Self-Determination and Aggression", Roger S. Clarke, *Yale Journal of World Public Order*, Vol. 7, No. 1, 1980.

> informed and democratic processes impartially conducted and based on universal adult suffrage."

Not surprisingly, Indonesia does not accept many of these arguments, in particular the argument on the question of the process of integration. It is edifying to hear what the Indonesian Minister for Foreign Affairs has to say on this point. In an address to the National Press Club in Washington D.C. on 20 February 1992, he said:

> "In any case, what is also often ignored or not sufficiently known is the fact that principle IX(b) of Resolution 1541(1960) states that with regard to integration 'the U.N. could when it deems necessary, supervise these processes'. It is clear therefore that the participation of the UN in the process of decolonization, while laudable, is not mandatory. Moreover, no two cases of decolonization are exactly the same, subject as they are to the geo-political and historical realities prevailing in the territories concerned. As to the exercise of the right of self-determination, many erstwhile non-self-governing territories have gained their independence without resort to Resolution 1514 and 1541 and this was also the case with all other ex-colonies of Portugal. In some of these countries, civil war and conflict continue even to this day." [6]

In the context of arguments about whether or not Indonesia ought fairly to be judged by international human rights norms and United Nations covenants and instruments it is noteworthy to recall that it is a nation which has not once, but twice subscribed to the principles for which the United Nations was established. Probably alone among the members of the UN, Indonesia has twice joined the United Nations having once withdrawn in 1963 under President Sukarno, and later returned to the UN under President Suharto. It is fair to assume therefore that Indonesia has taken its obligations seriously and deliberately as a member of the United Nations and might therefore be expected to abide by the rules which govern international behaviour not to mention the sentiments which are expressed in its own 1945 Constitution. [7]

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[6] As reported in the *Jakarta Post* , 11 March 1992.

[7] The opening paragraph of the 1945 Constitution of the Republic of Indonesia states " Whereas independence is the natural right of every

The Role of the Army

By 1980, East Timor had been laid waste by the bitter warfare which had been waged since 1975. It was estimated that Indonesia had 8,000 regular soldiers stationed there but apparently they were increasingly used for garrison duties. The journalist, David Jenkins, described the situation stating that "the Indonesian authorities must contend with a sullen and suffering populace, a people which will bear the scars of the recent upheavals for decades to come". [8]

Jenkins also described at the time a proposal on the part of the Indonesian Army to relinquish control of formerly privately owned East Timorese coffee plantations. It was claimed that the Army had used the revenues from the expropriated coffee to offset the cost of its military operations against the FRETILIN guerrillas and that the Army may have recouped up to US$20 million in that way.

Jenkins described how the first of about 100 coffee plantations was returned. When all 100 plantations were returned it was calculated that recurrent revenue lost to the Army might amount to as much as US$4-5 million each year. Coffee had been the principal cash crop in East Timor in the years preceding the Indonesian invasion in December 1975. Output of coffee had predictably declined as a result of the years of fighting and in 1980 was said to be about one quarter of the former total.

It was said that the provincial government, acting through a company called P T Denok Hernandez International, controls all coffee exports from East Timor.

> "A Timorese source with a detailed working knowledge of the local coffee business told FEER: 'behind P T Denok are the generals in Jakarta'. This is a claim which few in Jakarta would bother to deny. It is impossible to say how much money the Indonesian Army has made

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nation, colonialism must be abolished in this World because it is not in conformity with Humanity and Justice".

[8] "Death of a Dream of Freedom", David Jenkins, *Far Eastern Economic Review*, 23 May 1980, p. 30.

> out of the East Timor coffee business in the past four or five years, but the total could be as high as US$25 million." [9]

It is clear that coffee assumes very great importance in relation to the economy of East Timor in so far as plantation crops are concerned and, according to the authorities, "coffee and coconut play an important role in the market, thus priority for development is given to these two crops". [10]

In January 1982, the *Far Eastern Economic Review* (FEER) carried another article on the economy of East Timor, this time in connection with alleged brutality and corruption. Of particular interest was the report that the Provincial Assembly of East Timor had attempted to warn President Suharto that corruption, brutality and other abuses of power by some in the Army and Administration were causing increasing fear and anti-government feeling in the territory. [11]

The leakage of the report before it had been given to the President led to the arrest of two of the assembly representatives who had signed it. The Jakarta daily newspaper, *Merdeka*, was reported to have said that the two men were detained for allegedly allowing copies of the Assembly's report to reach foreign organizations, diplomats and news media.

The FEER report went on to state:

> ".....some people from elsewhere in Indonesia - most of them military personnel - who had come to the Province were guilty of 'great brutality' and abuse of power. They were ignoring local customs and behaving as 'conquerors'. The report says that the East Timor Provincial Assembly is 'continually with deep sorrow, receiving verbal as well as written reports of complaints from the people about torture, maltreatment, murders and other unimaginable cases. The basic laws in this Province are controlled by certain individuals or groups who placed their personal interests above the interests of the people

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[9] "Coffee Planters Comeback", op. cit., p. 58.

[10] "East Timor Strives for a Better Future", The Public Relations Bureau of the Province of East Timor, Dili, July, 1990.

[11] *Far Eastern Economic Review*, 1 January 1982, p. 26.

as a whole.....feelings of fear are wide spread..... with the result that the living conditions of the people have worsened.' " [12]

FEER reported that "The two Timorese assemblymen were arrested in Dili by members of *Kotis*, a special operations group of the Army in East Timor. They were later taken to Denpasar in Bali where the commander for the military region that includes East Timor, Brigadier General Dading Kalbuadi, has his headquarters."

The arrest of the Provincial Assemblymen was noted in Jakarta by the speaker of the Indonesian Parliament. He said that the detention of any Assembly member should have the approval of the President after consultation with the speaker of the Parliament. He was further quoted as saying, "The authorities should not act arbitrarily and they should abide by the procedures and law of the government."

The report says the damage done to the "fine high ideals" of the Indonesian Armed Forces in East Timor had been caused by "a mere handful of individuals" and the purpose of the Assembly's report is to "help create a good name and respect for the Indonesian Armed Forces in the eyes of the people of East Timor". The Assembly hoped that Suharto "will be gracious enough to rectify these distortions which can lead to unrest and anxieties among the people and native officials of East Timor".

In July 1988, the Provincial Governor of East Timor, Mario Carrascalao, was quoted in the Indonesian newspaper *Tempo* as complaining about some of the continuing shortcomings in the way in which development, was proceeding in the Province. In speaking about the style of economic development which was apparently depriving East Timorese people of jobs and producing unemployment, he referred to the huge influx of Indonesians from other parts of the country. He went on, "Many people from outside do come in because they have the right connections.....they don't create jobs. On the contrary, they snatch jobs from the local inhabitants. ...Private capital that creates jobs (should be encouraged). There is some private capital in East Timor at present but they don't invest capital. They only chase profits by working on government projects; then they take their profits and run, investing nothing so there is no job creation. They even bring their own stone carriers with them."

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[12] Ibid. p. 26.

The Governor was further quoted in the newspaper *Kompas* of 29 June 1988 as saying that official statistics show a sharp increase in the number of unemployed people in East Timor but the statistics understated the actual position. Statistics showed that there were 7,616 people without jobs in 1986/87 but according to Carrascalao, "Government administration at lower levels in the villages is not functioning, with the result that the majority of people without jobs have not been registered."

The Gadjah Mada Study

An authoritative study of the economy of East Timor was made by a team of socio-anthropologists from the Gadjah Mada University in Yogyakarta under the leadership of Professor Doctor Mubyarto and was published in Indonesia in March 1990. As the report itself indicates, the research was commissioned by the Bank of Indonesia and the provincial government in order to discover what made the East Timorese people "uncooperative, apathetic and constantly suspicious".

The report describes the situation as it existed in 1989/90:

> "The speed of the process of integration together with the civil war and the historical circumstances.....have not allowed the East Timorese the opportunity to reflect on the new situation facing them, namely that they are a part of the nation and government of Indonesia. Suddenly they have had to study Indonesian language and history....(and) the Pancasila (Indonesia's State ideology) and memorized the names of Indonesian heroes...all of whom they have never known because such things were not part of their history. Suddenly also (they) have to live and integrate into the structure of the Indonesian Government which is very different from their traditional government...all these things have caused a culture shock at all levels of East Timorese society." [13]

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[13] *East Timor: The Impact of Integration,* Prof. Dr. Mubyarto; The Gadja Mada University Research Centre for Village and Regional Development, Yogyakarta 1990; translated and published by the Indonesia Resources and Information Programme, December 1991.

The report goes on to discuss the role of the armed forces. It makes the point that:

> "As officials in the regional government (East Timorese officials)....find their youthful ideals being frustrated by one very powerful external factor: The Military. They feel that East Timor has an "overdose" of the military, not simply because of their numbers but more importantly because of their role in the development process. The special relationship between the military and the "monopolization" of the East Timor economy has caused a dilemma for these young indigenous officials."

An earlier Gadjah Mada University research team report of 1981 was quoted as saying that:

> "The situation reflects badly on both the provincial administration and the central government. There is a feeling among the East Timorese elite that the regional government administers the province as an appendage of the central government. The most serious matter is that they feel their region is being treated like a milking cow for the rich of Java."

The "Mysterious Killings"

In the early 1980s, many people, numbering many hundreds at least, were shot dead and in some cases their bodies left to lie in the streets, in circumstances which came to be known as the "mysterious killings".

When President Suharto published his autobiography in 1989 he made reference to these incidents in a manner which shocked many Indonesians. The following is a translation of part of that autobiography:

> "The press is always going on about the mysterious deaths of a number of people, calling them shootings of delinquents or "mysterious shootings", shortened to PETRUS and similar. Several politicians and intellectuals have spoken and written about this. The people busily discussed it. In international forums, there were also people

raising the issue and exposing it. They don't understand the facts of the matter.

This event was not even mysterious. The truth is, it was preceded by widespread fear in the community. The threats were from criminals, robbers, murderers and such like. The peace was disturbed. As if peace in our country was gone. It was as though there was nothing but fear. Those criminals' behaviour had gone beyond the bounds of (the definition of) humanity. They were not only outside the law but beyond the realms of humanity. For instance, old people, having been robbed of all their belongings, would still be killed. Isn't that beyond humanity? If you steal, well, steal, but don't kill as well. Then there were women whose riches were taken and those wives of other men were then raped by the criminals in front of their husbands. That's too much! Can a situation like that be allowed to continue? We had to impose our own "treatment" with firm actions. What firm actions? Yes, there had to be force. But that force wasn't just carried out with shots, bang! bang! Just like that. No! But those who opposed, yes, whether we liked it or not they had to be shot. Because they opposed, they were shot."

Then there were the bodies left lying around. That was for "shock therapy". So that people would well understand that there was still action that could be taken to confront and overcome criminals. This action was taken to destroy all the crime which had gone beyond the realms of humanity and then there was a decline in those disgusting crimes."

Human Rights Violations Prior to 12 November 1991

Prior to November 1991, the situation regarding human rights violations in East Timor was a matter of serious concern. The Indonesian military was contending with an armed resistance movement which had fought against them continuously since December 1975. Between 1975 and 1980, human rights groups estimate that more than 100,000 Timorese out of a population of 700,000 were killed. Since 1980, it is estimated that another 100,000 have died. Such organizations have documented human rights violations by Indonesian Security Forces, including extrajudicial executions, torture, disappearances and political imprisonment.[14] According to Amnesty International, hundreds of people have "disappeared" and remain unaccounted for, most assumed to be dead. In a series of trials beginning in the mid-1980s, scores of suspected opponents of Indonesian rule in East Timor were sentenced to lengthy prison terms for subversion and other political offences. Many were tortured or ill-treated while under interrogation. Most of the tried East Timorese political prisoners have served their sentences and have been released. However, at least six long-term political prisoners remain in custody in Jakarta and Dili. [15]

The Events of 12 November 1991

More than 50 people were killed and many others wounded on the morning of 12 November 1991 when Indonesian Security Forces fired automatic weapons for several minutes at a crowd of approximately 3000 people gathered at the Santa Cruz Cemetery in Dili, East Timor. Scores were severely beaten and stabbed during the attack. Those present had participated in a procession to the grave of Sebastio Gomes Rangel, a young Timorese man killed on 28 October 1991 when security forces attacked the Motael church where he and a number of Timorese had taken refuge.

The National Commission of Inquiry

The massacre of 12 November 1991, as well as the vast disparity between official Indonesian and eyewitness accounts, brought sharp criticism both domestically and internationally. In response to this mounting international pressure, the Indonesian Government in Presidential Decree No. 53/1991, on 18 November 1991, announced the formation of a seven-member National Commission of Inquiry.

On 26 December 1991, the National Commission of Inquiry issued an Advance Report of its investigation. That Report has been discussed in ICJs earlier report "Blaming The Victims: The 12 November 1991 Massacre in

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[14] *See*, n. 1 *supra*.

[15] Amnesty International, *Indonesia/East Timor, The Suppression of Dissent*, July 1992.

Dili, East Timor, and the Response of the Indonesian Government", February 1992.

THE JAKARTA TRIALS

Introduction

Between 16 March and 26 May 1992, five East Timorese students were prosecuted for their roles in a demonstration held in Jakarta on 19 November 1991 to protest the shooting of unarmed East Timorese civilians by Indonesian government troops in Dili, East Timor on 12 November 1991.

The defendants who were prosecuted individually for their participation in the demonstration were Fernando de Araujo, a 26-year-old student at Udayana University in Denpasar, Bali, and Joao Freitas da Camara, a 36-year-old former law student at Atma Jaya University in Jakarta, who were each charged with violating Indonesia's subversion law, a capital offence. Virgilio da Silva Gutteras, a 26-year-old student at Malang Institute of Technology, Agapito Cardoso, a 25-year-old student at Udayana University in Denpasar, Bali, and Dominggus Bareto, a 29-year-old law student at the University of Samarang on Java, along with Fernando and Joao, were charged with spreading hatred and enmity towards the government, for which the maximum penalty is seven years in prison.

The ICJ observer attended the trials in Jakarta and, for four of the defendants, subsequently had access to virtually all of the documents and briefs submitted by both the prosecution and the defence as well as to the written decisions of the judges. [16]

During the course of the trials, the observer had the opportunity to confer at length with various members of the teams of lawyers defending the

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[16] The trials were heard simultaneously in the district Court for Central Jakarta. The de Araujo and da Camara cases were tried on Mondays, Wednesdays, and Saturdays. The Cardoso, Bareto and Gutteras cases were heard on Tuesdays and Thursdays. As a consequence of this schedule, it was not possible for the observer to attend each session of the five trials. The observer therefore elected to monitor the trials of de Araujo and Gutteras. Where it was possible to attend more than one trial in a given day, for example, when proceedings in a given trial were adjourned early, the observer attended one of the other trials. Ultimately the observer was able to attend approximately 80% of the sessions for da Camara and Cardoso.

East Timorese.[17] In addition, the observer spoke with members of the prosecution team as well as with several of the judges about the Indonesian legal system in general and about the East Timorese cases in particular. Moreover, the observer spoke at length about the cases with a number of police and military intelligence officers who were, themselves, monitoring the proceedings on behalf of their respective agencies.

Finally, the observer was able to speak briefly with Joao, Fernando, Virgilio and Agapito.[18] Conversation was necessarily limited by the presence of the police, but each of the defendants took pains to thank the organizations represented by the observer for showing interest in their cases. Dominggus was the only defendant reluctant to speak to the observer, perhaps out of fear of compromising his case.

Similarly, the observer made several attempts to talk to some of the witnesses who testified during the proceedings. As nearly all of these witnesses had themselves been arrested in connection with the demonstration in Jakarta, but had not been charged with any offence, they were understandably reluctant to jeopardize their tenuous status.

In addition to the observer representing international legal organizations, one or two representatives from the embassies of the United States, Australia, Great Britain, the Netherlands and Japan attended the proceedings occasionally. The trials received regular coverage in the local written press and the summation arguments by the chief prosecutors in the two subversion cases were televised for the evening news, perhaps in anticipation of a request by the government for the death penalty.

During the first two weeks of the subversion trials, there was a heavy presence of armed police, some of whom had automatic weapons, in and around the courthouse. Subsequently, such uniformed security was unobtrusive. Nevertheless, the trials were closely monitored by plain-clothes police as well as by members of military intelligence. Although the attendance by the observer or other members of the public was not physically barred by the authorities, all members of the public attending the two subversion trials were required to surrender an identity card in return for a security clearance pass. In addition, everyone attending the subversion trials was photographed and filmed by the members of various government security and intelligence departments. This somewhat more subtle intimidation had the effect, certainly, of denying the defendants any emotional or moral support they might have garnered from the presence of friends and colleagues. One police official told me that the government needed to guard against a repeat of the 19 November demonstration, a rather peculiar concern given the government's virtual stranglehold on the East Timorese community in Jakarta.

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[17] Each defence team was composed of the members of the Indonesian Legal Aid Foundation (Yayasan Lembagga Bantuan Hukum Indonesia), commonly known as LBH, and IKADIN, one of Indonesia's two bar associations. In an effort to ensure that the resources of LBH were not overwhelmed and that the East Timorese students received the best defence possible, the IKADIN lawyers agreed to provide their services free of charge. Without exception, the defence lawyers were excellent advocates for their clients.

[18] After the initial reference, the defendants are referred to by their first names only, as is customary in Indonesia.

Prior to the opening of each day's session, the defendants, none of whom was in physical restraints, were free to wander through the halls and to speak with each other, with members of the press and the public, as well as with some of the East Timorese students who had been called to testify. In general, the defendants appeared healthy and in good spirits throughout their trials. [19]

Background

On 12 November 1991, Indonesian government troops killed more than 50 unarmed civilians in Dili, East Timor who had been participating in a demonstration. Shortly afterwards, Fernando de Araujo, studying in Denpasar, Bali, received a phone call from Constantio Pinto, the head of CE (Comité Exécutif) , in Dili, informing him of the killings and asking him to organize some sort of action to protest the killings. Fernando, the head of the student group RENETIL (Resistencia Nacional Das Estudiantes de Timor Leste) which he helped found in 1988 and which was dedicated to the protection of human rights in East Timor, then met with several other East Timorese students studying in Bali, including Agapito, to discuss what could be done. Fernando also telephoned Joao in Jakarta, who had already heard about the killings on the radio, and it was agreed that Jakarta was the most appropriate location for any sort of action or demonstration.

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[19] Fernando did suffer from a serious kidney ailment prior to the commencement of his trial and was obviously ill during his initial appearance in court in early March. At that time, there was some dispute as to whether he was receiving sufficient medical care in prison. Accordingly, the judges in his case agreed to adjourn his trial until he was well enough to attend.

Subsequently, Fernando telephoned several East Timorese studying on Java, all of whom had already heard the news of the killings through the mass media. Among those he contacted were Dominggus in Samarang and Virgilio in Malang. Fernando informed them that there would be some sort of "action" in Jakarta and that, if they were interested, they should go to Jakarta and look up Joao who would have more information. Fernando had recently met with Dominggus, Virgilio, Joao and several other East Timorese in Malang in late October where the planned 4 November visit to East Timor by a Portuguese parliamentary delegation (the "Portuguese parliamentary delegation visit") was discussed. That visit was cancelled, however, following the Indonesian government's refusal to allow an Australian journalist, accompanying the delegation, entry into the country because of her alleged FRETILIN sympathies.

Ultimately, a decision was taken to hold a demonstration on 18 or 19 November in Jakarta to express the anguish and anger of these East Timorese students over the killings in Dili. Virgilio and Dominggus, each accompanied by friends, and Agapito accompanied by a friend and carrying with him approximately RP. 90,000, went to Jakarta on or about the 14 and 15 of November. There, they met with Joao and other East Timorese students who had come to Jakarta from all over Java .

On 17 and 18 November 1991, several informal meetings were held at Joao's house and at the Hotel Borneo where a number of the East Timorese were staying to plan that type of "action" the students should take. After agreeing to stage a protest, the students made a banner and approximately 20 posters, some of which were in English, some in Bahasa Indonesia. Joao, a passionate advocate of East Timor's right to self-determination, took an active leadership role during these meetings and helped write a declaration in Portuguese entitled "Declaration of the East Timor Students in Indonesia" (the "Declaration"). The Declaration not only protested the deaths in Dili, but called attention to Indonesia's role in East Timor since 1976 and asked for intervention by the international community to find a peaceful solution to the problems there. The Declaration was signed by many of the East Timorese present at the various meetings, including Joao, Virgilio, Agapito, and Dominggus.

Among the posters in English the following sentiments were expressed:

"Mr. Alatas! The question is not development but invasion and self-determination." (Mr. Alatas is the Foreign Minister of Indonesia.)

"We are the testimony of the Indonesian brutalities along 16 years."

"Integration is the total extermination of our people."

"Where are our martyrs? We want them to be buried according to our tradition."

In particular, the banner in Bahasa Indonesia seemed to catch the attention of the authorities:

"Lebih baik mati dari pada integrasi." (Better death than integration.)

At the conclusion of the meeting on 18 November, the students agreed to meet the next morning in front of the United Nations mission located on one of Jakarta's main thoroughfares. Joao specifically advised the students to conduct a silent, peaceful protest in order to avoid provoking the Indonesian authorities into violent action.

On 19 November 1991, at 10:30 a.m., approximately 70 East Timorese students, some wearing black headbands or armbands, gathered at the United Nations mission where they gave a copy of the Declaration to a member of the United Nations staff and displayed their posters and banner so that they could be read by both the people in the mission as well as by passers-by. After concluding their protest at the United Nations, the students continued on to the Japanese embassy and then to the Australian embassy where they repeated their actions. Eyewitness accounts indicate that the students' actions were peaceful and that a number of the students wept as they displayed their posters.

When the students left the Australian embassy to continue to another foreign mission, the police, who had been monitoring the events, broke up the demonstration and arrested nearly all the demonstrators. More than a week later, the Indonesian government announced that of those who had been arrested, 49 had been released and 21 were being detained for further questioning. Eventually, all but Joao, Virgilio, Agapito, and Dominggus were released.

On 24 November 1991, a number of East Timorese students in Bali, including Fernando, who were suspected of participating in anti-government activities, were arrested. Initially held incommunicado in Bali, Fernando was ultimately transferred to a jail in Jakarta so that he could be tried in concert with Joao, Virgilio, Agapito and Dominggus.

The Subversion Cases

The government charged both Fernando and Joao with violating Indonesia's subversion law which provides that anyone may be charged with subversion:

> "...who has engaged in an action with the purpose of, or clearly with the purpose, which is known to him or can be expected to be known to him that it could distort, undermine, or deviate from the ideology of the Pancasila or the broad outlines of state policy, or otherwise destroy or undermine the power of the State or the authority of the lawful government or the machinery of the state, or disseminate feelings of hostility or arouse hostility, disturbances or anxiety among the population or broad sections of society or between the State of the Republic of Indonesia and a friendly state...."

U.U. No. 11/PNPS/1963, paras. (1)-13(1). [20]

The government's subversion case against the two East Timorese was not limited to the role they each played in the demonstration in Jakarta on 19 November 1991 (the "Jakarta Demonstration"). Rather Fernando and Joao were prosecuted for their efforts to bring the unsettled situation in East Timor, in general, and the 12 November killings in Dili, in particular, to the attention of other Indonesians and of the international community. Both men were charged with being members of RENETIL, a clandestine organization, and with having contacts with members of the outlawed FRETILIN and CNRM (Concelho Nacional De Resistencia Maubere) organizations, groups dedicated to the independence of East Timor. In addition, Fernando and Joao were charged with accepting money from foreign organizations either in return for providing information "damaging" to the Indonesian government or for use in their allegedly clandestine and subversive activities.

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[20] In addition, the government charged Fernando and Joao with violating arts. 154 and 155 of Kitab Undang-Undang Hukum Pidana (KUHP), the Indonesian penal code. Art. 154 provides: "The person who publicly gives expression to feelings of hostility, hatred or contempt against the Government of Indonesia, shall be punished by a maximum imprisonment of seven years or a maximum fine of three hundred Rupiahs." Art. 155(1) similarly provides "Any person who disseminates, openly demonstrates or puts up a writing where feelings of hostility, hatred or contempt against the Government of Indonesia are expressed, with intent to give publicity to the contents or to enhance the publicity thereof, shall be punished by a maximum imprisonment of four years and six months or a maximum fine of three hundred Rupiahs."

1. Fernando de Araujo

The Government's Case

It is clear from the indictment and the evidence proffered in its support, that the government believed that Fernando was the central communications figure between FRETILIN and CNRM and the organization he helped found, RENETIL. Indeed, the Chief Prosecutor likened Fernando to a commando who, upon receiving orders from the central command, sends his operatives into the field to carry out specific missions. Specifically, the government charged that the acts, set forth below, constituted actions that Fernando knew or could be expected to know would undermine the power of the state.[21]

1. Founding RENETIL in Bali in 1988 upon instructions from members of CRNM and FRETILIN.
2. Having contacts with and receiving instructions from Xanana Gusmao as far back as 1986 and from Jose Ramos Horta of FRETILIN since 1987.
3. Having contacts with and receiving instructions from Constantio Pinto of CE.
4. Organizing and leading several meetings of RENETIL between 1988 and 1991.
5. Signing a letter, dated May 1991, to United States President George Bush comparing Indonesia's annexation of East Timor in 1976 to Iraq's 1990 invasion of Kuwait and asking US intervention on behalf of East Timor.

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[21] This is only a summary of the allegedly subversive activities engaged in by Fernando. The indictment in this case, as in the others, was lengthy, detailed and repetitive. *See* , *Surat Dakwaan Tindak Pidana Subversi Atas Nama Terdakwa Fernando de Araujo*, Maret 1992.

6. Upon instructions from Constantio, preparing posters and banners to be used in a demonstration in connection with the Portuguese parliamentary delegation visit.
7. Following the murder of an East Timorese civilian at the Motael church in Dili on 28 October 1991, telephoning East Timorese in Lisbon, London, Australia and Jakarta to inform them of the killing and asking them to alert the international community,
8. On 12 November 1991, calling Joao da Camara with news of the killings in Dili and passing on instructions from Constantio that the international community in Jakarta be informed of the shootings and that a demonstration be organized in Jakarta to protest the killings
9. Giving Agapito Rp. 90,000 to be used for expenses related to the Jakarta demonstration.
10. Receiving money from overseas sources to be used for clandestine activities.

In support of its case, the government presented the testimony of eight witnesses, including that of the other four East Timorese tried in Jakarta. Essentially, the testimony at trial did little more than establish the broad outlines of the government's case. For example, it was established that Fernando was involved with RENETIL, that several meetings which included both members and non-members of RENETIL were held (though there was a dispute over whether some of the meetings were merely informal get-togethers, a point the Court ultimately resolved in favour of the prosecution), that Fernando did sign the letter to President George Bush, that he spoke by telephone with Joao several times and that he gave Agapito Rp. 90,000, to defray expenses arising out of the Jakarta demonstration.

Much of the testimony went far beyond any of the witnesses' actual knowledge of the defendant's actions or intentions. Both the prosecutor and the judges[22] who traditionally play a very active role in questioning witnesses, concentrated on establishing the goals or purposes of RENETIL. The testimony on that critical point varied, according to the particular witness being examined, from protecting the rights of East Timorese to working towards independence through self-determination. At no time did any witness state that violence against the Indonesian government was ever advocated by RENETIL.

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[22] In criminal cases, a trial is heard by a three-member panel composed of a senior judge, who acts as the Chief Judge, and two junior colleagues.

Over the strenuous objections of defence counsel and of the defendant himself, the Court permitted the prosecution to read into evidence the sworn statements of six individuals who were unable to testify in person. Arguing that it was too costly for the government to bring the witnesses from Dili to Jakarta, the prosecution claimed that the evidence was critical to establishing that Fernando was a central figure in a clandestine information network and attended an underground meeting in Dili in August 1991, a point the defendant vigorously denied. Defence counsel pointed out that the testimony was elicited in the presence only of the police or other investigating authority and a representative of the prosecutor's office, thus depriving the defence of an opportunity to impeach the credibility of the witnesses or to test the veracity of their testimony.

The broad language of KUHAP (Kitab Undang-Undang Hukum Acara Pidana, the Indonesian code of Criminal Procedure) provides the Court sufficient latitude to reject the defence argument that those witnesses should not be heard. Article 162 (1) states that the sworn testimony of a witness can be read into the record where the witness is not present at a trial for reasons of death or "because of another reason connected with the interests of the state". Moreover, such sworn testimony "Shall be considered equal in value to the testimony spoken by a witness under oath at a trial" (Art.162 (2)).

This weakness in KUHAP was exploited by the prosecution, denying Fernando's lawyers an opportunity to present an adequate defence. For example, in Fernando's case, several of the witnesses whose sworn statements were read were themselves in detention awaiting trial in Dili. The Court did afford the defendant a chance to "object to or correct" the testimony as it was read into the record. Nevertheless, one can only speculate as to whether improper pressure was exerted in extracting the statements from these witnesses or whether deals favourable to their particular cases were made in return for "damaging" testimony against Fernando.[23]

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[23] The importance of being able to confront a witness was abundantly clear during the trials of Fernando and others. In several instances, some

Called by the prosecution, Fernando himself testified at great length about his role in RENETIL and his contacts with members of other "clandestine" organizations. He explained that RENETIL was founded to protect the rights of the East Timorese, to defend the independence declared on 28 November 1975 following the withdrawal of Portuguese rule and to keep East Timorese students studying in Bali and Java informed about the events in East Timor. He acknowledged that from time to time RENETIL received money from East Timorese living abroad. He admitted receiving phone calls at various times from Constantio in East Timor, but emphasized that Constantio called only to give him information about events in East Timor that could then be passed on to the East Timorese living on Bali, Java and abroad. Fernando denied receiving "instructions" from Constantio and pointed out that his limited contact with Xanana was the receipt of an "open" letter to all East Timorese students exhorting them to study hard and to remember the struggle of East Timor.

In a lengthy summary brief read before the Court in late April, the prosecution argued that each element of the subversion and criminal laws had been proved. [24] The prosecution claimed that, in an attempt to undermine the authority of the Indonesian government, the defendant had conducted a series of subversive activities between 1986 and 1991, including masterminding the Jakarta demonstration. Accordingly, the prosecution called upon the Court to impose a sentence of 15 years as an appropriate punishment.

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of the witnesses, while testifying at a trial, retracted or expanded upon the statements that they had provided to the investigating authorities during their interrogation and which were contained in the Berkas Perkara, or compilation of evidence relied upon by the government in prosecuting the defendants. When asked by the prosecutors or judges why the change in testimony, the reply was invariably that they had been confused because of the lengthy periods of interrogation or had in some way felt pressured. The latter point was never pursued to determine what sort of "pressure" had been brought to bear.

[24] *See, Tuntutan Pidana Tindak Pidana Subversi Terdakwa Fernando de Araujo*, April 1992.

The Defence.

Pre-Trial Motions

Counsel for Fernando challenged the indictment on a variety of grounds. The most important arguments raised by the defence included the claim that the defendant had been denied his right to counsel during his interrogation, as provided by article 56 of KUHAP. Secondly, counsel argued that the subversion law was no longer valid as the political reasons which inspired its birth has long since become obsolete. Finally, counsel challenged the correctness of the indictment, claiming that the language used in it was, among other things, arcane and obscure. [25]

In a separate motion, Fernando also argued that the indictment should be rejected on the grounds that he had been denied his right to counsel and that his arrest had been made without a proper warrant. He further rejected the application of KUHP to his case claiming that the charges against him could only be examined under the principles of international law. Finally, he denied that any of his activities constituted subversion, explaining that they were all based on the international law formulated in various United Nations resolutions relating to East Timor. [26]

Because the observer was unable to obtain the decision of the Court as to the defence challenges to the indictment, it was not possible to conclude whether the Court had a valid basis for rejecting the defendant's claims. With respect to the pre-trial detention issues, it is possible that the Court held that since articles 77 to 82 of KUHAP provide a mechanism whereby a defendant can challenge the validity of his pre-trial detention before trial and the defendant fails to do so, that defendant is precluded from raising those claims subsequently.[27]

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[25] *See , Keberatan Tim Penasehat Hukum Terdakwa Fernando de Araujo*, 21 Maret 1992.

[26] *See, Eksepsi Dari Terdakwa Fernando de Araujo*, Maret 1992.

[27] Certain protections provided for in KUHAP and in KUHP are superseded by special procedural provisions contained in the subversion law itself. Among other things, these relate to expanded powers of search and seizure , detention, the hearing of witnesses and the concurrence of criminal sentences. However, in the cases of Fernando and Joao, the procedural exemptions set forth by the subversion law do not appear to have been invoked by the prosecution or the Cout in response to the due process violations cited by the defense in these cases.

Trial

During the trial, the defence called no witnesses of its own and presented its case by the cross-examination of the prosecution witnesses.[28] Cross-examination focused on establishing whether a particular witness had personal knowledge of the defendant's activities and then probing the extent of any such knowledge. In essence, the defence tried to show the purpose or goal of the defendant's activities was not the subversion of the Indonesian state.

In its summation papers, [29] the defence called for the defendant's acquittal, presenting several arguments. First, the defence rejected and corrected the findings of fact offered by the prosecution. In numerous instances in its proposed findings of fact, the prosecution had glossed over inconsistencies in the testimony, resolving them in favour of the government view of the case. In particular, in several cases, the prosecution relied on the testimony of witnesses who were not in the court and claimed that the defendant's own testimony, as well as that of others, corroborated the statements of the absent witnesses.

Sharply rejecting the government's manoeuvres, the defence relied on the transcript to show that the witnesses at trial had, in fact, testified that they had no personal knowledge of these matters.[30] The defence argued that, moreover, under article 185 (2) of KUHAP, the testimony of the absent witness alone was insufficient proof of the defendant's acts.[31]

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[28] The defence did attempt to call representatives of the United Nations and of the Dutch and Japanese embassies to testify on behalf of Fernando. The Chief Judge, however, refused to issue a summons to the witnesses, advising counsel to call the witnesses on their own. According to the defence team, for diplomatic and political reasons, representatives of the foreign missions declined to appear.

[29] *See* , *Sebuah Pembelaan Untuk Fernando de Araujo*, 11 Mei 1992, and *Duplik Perkara Pidana Subersi Atas Nama Fernando de Araujo*, 18 Mei 1992.

[30] There is no official transcript of any of the proceedings, a consequence very likely due to inadequate funding rather that to evil intent. There is a clerk of the Court, seated behind the judges, who takes longhand notes of the proceedings .
That record must be incomplete at best since, in all the sessions attended by the observer, the clerk was often straining to hear what was being said and was often interrupted by messages brought in for one of the judges. The judges themselves took very few notes. Junior members of both the prosecution and the defence teams took extensive notes. In addition, the defence teams in the two subversion cases, as well as in Virgilio's case, made a tape recording of each session which was transcribed daily.

The defence also sought to establish a valid political and moral basis for the defendant's actions by setting forth the history of Indonesia's role in East Timor since 1976 and arguing that the situation in East Timor was rightly a matter for international concern, particularly in light of the government's own lack of objectivity on the issue of East Timor.

The defence further denied that the defendant, in calling for a democratic resolution to the problem of East Timor, had any intention of undermining or distorting the policy and strength of the government of Indonesia. While acknowledging that the defendant did not regret his conduct, the defence pointed out that, given the attitude of the Indonesian government and the circumstances of Fernando's youth, such an attitude, though perhaps objectionable, could hardly be subversive. In any event, argued the defence, the subversion law itself was obsolete and contrary to the 1945 Constitution. In modern day Indonesia, where the President's "New Order" regime had ensured stability for the past 25 years, even the hate-sowing laws were an anachronism.[32]

In a separate statement, which he wrote and then read to the court, Fernando explained to the Court why the people of East Timor are entitled to self determination.[33] He presented an historical analysis of Indonesia's relationship with East Timor, pointing out that Indonesia's annexation of East Timor was at variance not only with the wishes of East Timorese, but with

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- The observer's own notes of the testimony from Fernando's trial, which was the subject of those factual disputes, supports the defence version of the facts in each instance.

[31] Article 185 (2) states that: "The testimony of one witness alone is not sufficient to prove that an accused is guilty of the act of which he is accused."

[32] Additional arguments included both an attack on the sufficiency of the indictment as well as claims that the defendant's arrest and search of his house had been improper and that he had been denied legal counsel as provided for under art. 56 of KUHAP which states that it is obligatory for a lawyer to be provided "at all stages of examination in the criminal justice process" where there is a possibility of the accused being charged with a capital offense.

[33] *See, Pembelaan Terdakwa Fernando de Araujo Terhadap Tuntutan Tim Penuntut Umum--Demi Penetuan Nasib Sendiri Rakyat Haubere*, 11 Mei 1992.

international law as well. Fernando argued that it was unethical, objectionable and illogical to jail him for 15 years (as requested by the prosecution) for his efforts to secure the East Timorese people's right to self-determination. Raising the issue of the illegal nature of his arrest and detention, the defendant concluded by advising the Court that as long as the problems in East Timor remained unresolved, he would not be the last to stand up for the rights of the East Timorese.

The Decision and Verdict

The Court found the defendant guilty of violating both the subversion and the criminal laws.[34] In general the court provided very few reasons for its decision, merely finding that certain facts had been proved sufficient to find the defendant guilty of the acts with which he had been charged. With one or two exceptions, the Court accepted the defence arguments regarding the disputed facts, omitting them from its finding of facts. It rejected, however, the claim that the subversion law was not valid and declined to address the issues relating to the defendant's pre-trial detention and to the sufficiency of the indictment, stating that it had decided those questions in an earlier decision.

The Court held that the defendant, the recipient of a government scholarship, was the head of an illegal organization and set up branches of it throughout Java, accepting money from foreign sources to finance its activities. Moreover, stated the court, the defendant had either participated in or caused to be held meetings at which activities antagonistic to the Indonesian government were held. The Court further found that the defendant had signed the May 1991 letter to President George Bush comparing Indonesia to Iraq and had various contacts with other individuals whose activities were subversive under the law. The Court concluded by finding that the defendant had not only acted on his own, but also had intensively recruited others to perpetrate "punishable acts".

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[34] *See,* Putusan, No. 22/IX/PID/B/PN.JKT.PST., 25 Mei 1992. From the time the indictment was read in court, the general view of those attending the trial was that Fernando, and all the other defendants for that matter, would be found guilty. The only suspense arose from speculation as to the sentence the prosecution would seek and the court would impose.

The Court rejected the prosecution's request for a sentence of 15 years, and instead sentenced the defendant to 9 years in prison with credit for time served. In imposing the sentence, the Court cited as mitigating factors the defendant's youth, his lack of a prior criminal record and the fact that during the proceedings the defendant had always been well mannered and dignified, allowing the trial to proceed in an orderly manner.

2. Joao Freitas da Camara

The Government's Case

As in the case against Fernando, the charges relating to the Jakarta demonstration were only the tip of the iceberg of the government's case against Joao. The government clearly saw the events of 19 November as a convenient means to silence a man who had long been a vocal critic of Indonesia's annexation and subsequent integration of East Timor. While the indictment charged Joao with organizing and leading the demonstration in Jakarta, as well as receiving instructions with East Timorese who had links to FRETILIN and to CNRM, it is clear that Joao's relationship with members of the international community was what truly disturbed and irritated the government. Indeed, the very first charge of the indictment accuses Joao of providing information regarding East Timor to international human rights organizations.

Specifically, the government claimed that the following acts violated its subversion and "hate-sowing" laws:

1. Receiving funds from, among others, a FRETILIN group in Australia, a Catholic agency in England, Amnesty International, the Australian Council for Overseas Aid (ACFOA), as well as from other such organizations throughout the world, and from H.J.C. Princen, a long-time human rights advocate in Jakarta.

2. Since 1983, providing information and expressing anti-government sentiments to foreign organizations, including those named above, as well as to members of the foreign press corps and embassies in Jakarta.

3. Upon instructions from Fernando and Constantio, planning a demonstration to be held in connection with the Portuguese parliamentary delegation visit and attending on 26 October 1991 a RENETIL meeting in Malang where such plans were discussed.

4. Serving as the head of the Jakarta branch of RENETIL.

5. On 12 November 1991, receiving and carrying out the telephone instructions from Fernando in Bali and from Constantio in Dili to relate the events there to embassy officials and to members of foreign news organizations in Jakarta, as well as to human rights organizations overseas, and to organize a demonstration protesting the government's killing of unarmed civilians in Dili.

6. Contacting East Timorese studying throughout the island of Java and informing them of the demonstration.

7. Leading various meetings in Jakarta on 17 and 18 November 1991 during which plans for the demonstration were finalized, and the posters, the banner and the Declaration, all of which condemned the government's actions in Dili, were prepared.

8. On 19 November 1991, leading a demonstration in Jakarta in front of the United Nations mission and the embassies of Australia and Japan where the Declaration was delivered to embassy staff and the posters and banner displayed to the public.

9. Signing the May 1991 letter to President George Bush which compared Indonesia's annexation of East Timor to Iraq's invasion of Kuwait and asking for US intervention on behalf of East Timor.[35]

The prosecution called sixteen witnesses in support of its case. In addition, the government introduced the sworn statements of two witnesses who did not attend the trial. As in Fernando's case, each of the other defendants being tried in Jakarta testified in the proceedings against Joao. Much of the broad outline of the prosecution's case was proved by the testimony of the various witnesses. Moreover, Joao's own testimony clearly established that he played an important role in providing information about East Timor to the international community and that he helped organize and lead the Jakarta demonstration. Though he denied being a sworn member of RENETIL, Joao acknowledged that he fully supported the organization's goals.

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[35] *See, Surat Dakwaan Perkara Subversi Terdakwa Joao Freitas da Camara*, Maret 1992.

In a long and detailed closing argument, the prosecution argued that each element of the subversion and criminal laws had been proved.[36]

The Chief Prosecutor emphasized that, despite the defendant's assertions to the contrary, he had clearly been providing information hurtful to the Indonesian government to foreign organizations and individuals and was thus guilty of conducting a series of subversive activities over a long period of time. Moreover, claimed the prosecution, as Joao has not denied his leadership role leading up to and during the Jakarta demonstration, and had not renounced the possibility of further such activities, it was clear that he was a continuing threat to the authority of the government.

The Defence

Pre-Trial Motions

In calling upon the Court to reject the indictment, counsel for Joao argued that he had been denied the assistance of counsel in circumstances where article 56 of KUHAP makes the provision of counsel mandatory. The defence also challenged the language used in the indictment, claiming that it was arcane and obscure. Finally, counsel claimed that the subversion law itself was obsolete and no longer valid as the circumstances in which it had been enacted no longer existed.[37]

Joao, making a separate motion against the indictment, rejected the jurisdiction of the Court, claiming that the charges against him should be examined under the auspices of the United Nations. Like Fernando, Joao also claimed that since the United Nations recognized the right of the East

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[36] *See, Surat Tuntutan Perkara Subversi Terdakwa Joao Freitas da Camara*, April 1992.

[37] *See , Keberatan Tim Penasehat Hukum Terdakwa Joao Freitas da Camara*, 21 Maret 1992.

Timorese people to self-determination, any activities conducted toward that end were not subversive. He explained that the Jakarta demonstration was not meant to undermine the authority of the government in any way, but was merely a call upon the government to settle the East Timor problem in a fair and complete manner. [38]

The observer was unable to obtain the decision of the Court which dismissed the defence challenges to the indictment, and thus cannot state definitively whether the Court had a valid basis for rejecting the defendant's claims . With respect to the pre-trial detention issues, it is possible that the Court held that since articles 77 to 82 of KUHAP provide a mechanism whereby a defendant can challenge the validity of his pre-trial detention before trial and if the defendant fails to do so, that defendant is precluded from raising those claims subsequently.

Trial

The defence did not call any witnesses of its own. Much of the cross-examination focused on the political and moral basis for both the witnesses' and defendant's beliefs and actions. It appeared to the observer that the defence had decided not to challenge the fact alleged by the government. Instead, the defence concentrated on establishing the fact of the international community' s recognition of the right of the East Timorese to self-determination and that, therefore, Joao's activities toward that end were not subversive.

In its summation argument read to the Court,[39] counsel for Joao argued that the subversion law had not been among those laws codified and unified in 1973, in accordance with the Guidelines of State Policy and was thus null and void. The defence further reasoned that even if the Court were to find the subversion law valid, under the principles of international law applicable in this case, the prosecution had failed to prove the defendant guilty. In addition, the defence raised the issue of the denial of the right to the assistance of counsel, pointing out that, as a result, the defendant's sworn statement contained in the Berkas Pekara, was, in effect, tainted.

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[38] *See, Pengajuan Keberatan Terhadaph Tuduhan Perkara Subversi*, 2 Mai 1992.

[39] *See , Peembelaan (pleidooi) Tim Penasehat Hukum Terdakwa. Joao Freitas da Camera*, 2 Mei 1992.

In a voice sometimes breaking with emotion and at other times rising with passion and defiance, Joao explained to the Court why he was compelled to act as he did on behalf of the East Timorese.[40]

Describing the fleeting joy of the East Timorese over their independence from Portuguese rule, he continued with an indictment of the government's annexation of East Timor and its methods of integrating the territory into the Republic of Indonesia.

While he acknowledged that the Indonesian government had conferred certain material benefits on East Timor he pointed out that such benefits were not compensation for the denial of the people's right to self-determination and independence. He denied any subversive intent towards the government of Indonesia, advising the Court that all his activities had been conducted with the intention of promoting the government to settle the question of East Timor in a just and dignified manner and in accordance with the precepts of applicable international law. Notably absent from the defendant's statement was an apology to the Indonesian government or any expression of regret for his acts. Indeed, Joao made it clear that he stood by his principles and was ready to be imprisoned for them.

Joao also objected to the circumstances of his detention and interrogation, claiming that despite repeated requests for a lawyer, he was denied such assistance and was subsequently questioned at all hours, night and day. He concluded that he was, in effect, coerced into signing his sworn interrogation statement.

The Decision and Verdict

Presenting a lengthy analysis of the law and the applicable facts, such as the status of East Timor under Portuguese and Indonesian administration, the Court declined to accept that international law restricted the application of Indonesian Law in the proceedings against Joao.[41] The Court concluded that in spite of the defendant's claim to Portuguese citizenship, he was, nonetheless, subject to the Indonesian Law.

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[40] *See, Pembelaan Terdakwa Joao Freitas de Camara Terhadap Tuntutan Tim Penuntut Umum Di Pengadilan Negeri--Demi Kamardekaan Timor Leste*, 2 Mei 1992.

The Court held, among other things, that, since 1983, the defendant, acting alone and with friends, had espoused the cause of East Timor's independence, had maintained contacts and received instructions from individuals with links to clandestine organizations, was the head of RENETIL in Jakarta, had received funds from international human rights organizations in exchange for information, had supplied information about East Timor generally to foreign organizations and individuals, thus contributing to an unfavourable image of Indonesia in the eyes of the world, and had played an active role in planning and carrying out the Jakarta demonstration . Accordingly, the Court found that the defendant had committed acts sufficient to satisfy the elements of the subversion law.

In holding that Joao's activities could undermine, distort or destroy the strength of the State, the Court cited various sections of the declarations given to the foreign missions during the Jakarta demonstration which compared Indonesian annexation of East Timor to Iraq's invasion of Kuwait. The Court concluded, therefore, that the defendant's authorship of a large part of that Declaration also rendered him guilty of subversion.

Finding the defendant guilty of the primary charge of subversion, the Court held it was not necessary to consider the subsidiary criminal charges. The Court concluded that the defendant had misused his government scholarship by coming to Jakarta not to study but to further the cause of independence of East Timor. Moreover, the Court remarked upon the defendant's unwillingness to express remorse for his activities. Despite the Court's harsh conclusions about Joao's activities and intentions, it nevertheless rejected the 13-year sentence sought by the prosecution (and, despite the fact that, following Joao's fiery defence statement, the prosecution had reiterated the need for a lengthy sentence), and sentenced the defendant to 10 years in prison with credit for time served.

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[41] *See, Putusan 23/IX/PID/B/1992/PN.JKT.PST.*, 26 Mei 1992.

The Criminal Cases

Virgilio da Silva Gutteras, Agapito Cardoso, and Dominggus Bareto were charged with crimes that related specifically to their participation in the Jakarta demonstration. Nevertheless, much of the testimony and documentary evidence offered by the government in each of their cases was similar to that presented in the subversion trials of Fernando and Joao and, as such, was essentially irrelevant to the specific charges against the criminal defendants. For instance, the government failed to bring charges relating to the 26 October meeting in Malang which was attended by the three criminal defendants and which figured prominently in the government's arguments that Fernando and Joao had conducted a series of subversive activities. Though the indictments in the three cases did not mention this meeting, there was, nevertheless, extensive testimony on the subject.

3. Virgilio da Silva Gutteras

The Governments 's Case

The indictment against Virgilio charged him with having expressed hostility and hatred toward the Indonesian government, thereby violating articles 154 and 155 of KUHP.[42] Specifically, Virgilio was accused of:

1. Having demonstrated in front of the missions of United Nations, Japan and Australia in Jakarta on 19 November 1991 during which the Declaration describing the problems in East Timor and the need for international intervention was delivered to the missions, and where certain posters and a banner, all drawing attention to the 12 November 1991 killings of unarmed civilians by Indonesian government troops, were displayed.

2. Attending meetings on 17 and 18 November in Jakarta where plans were made for the demonstration and during which the Declaration, posters and banner were prepared.

3. Proposing a section of the Declaration which, translated into English, read "The struggle of the people of Namibia and all the peoples

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[42] *See* ,n. 20 *supra*, for text of art. 154 and 155.

who wish to attain their nationalistic and political goals is the same struggle for Maubere (East Timor)".

4. Displaying a poster during the demonstration which read "Where are our martyrs? We want them to be buried according to our tradition."

In addition to the defendant's own testimony, the prosecution presented eight witnesses in support of its case, as well as the sworn statements of two witnesses who did not attend the proceedings. The testimony of the absent witnesses was offered to establish that conditions in East Timor had improved dramatically following its annexation by Indonesia, an argument that the government focused on at great length.

The Defence

Pre-Trial Motions

The lawyers representing Virgilio urged the Court to dismiss the indictment on the grounds that the investigating authorities had failed to provide the defendant with counsel during his interrogation.[43] Acknowledging that Virgilio had initially rejected the assistance of counsel, counsel for the defence argued that under KUHAP article 56, the state was nevertheless obligated to provide such assistance. Counsel further argued that the Court should enforce the right to counsel on the grounds that such a right was provided for in the Universal Declaration of Human Rights and that Indonesia, as a signatory to the UN Charter, was bound to enforce that right.

The defence also reasoned that the indictment should be rejected as impermissibly vague since it failed to specify whether the defendant was being charged with aiding the subversive activities of Joao or with expressing hostility toward the government. Finally, counsel argued that the hate-sowing articles were at variance with the state philosophy of Pancasila and urged the court to reject a law that had been created by the Dutch colonial power to silence Indonesian nationalists.

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[43] *See , Ekepsi Dalam Perkara Pidana Atas Nama Virgilio da Silva Guterres.*

The Court denied the motion by the defence against the indictment. Again , as the observer has not read the Court's reasons for doing so, it is difficult to know whether the basis for rejecting the defence claims, in particular those related to the denial of counsel, was valid.

Trial

As in the two subversion cases, counsel for Virgilio presented its defence through the cross-examination of witnesses called by the government.[44] Though the defence did not deny that Virgilio had participated in the demonstration, it emphasized the shock and horror felt by the defendant upon hearing the news of the killings of his compatriots in Dili.

In its closing brief, counsel for the defence also took issue with the government 's arguments that the defendant had intended to express hostility or hatred towards the Indonesian government.[45] Counsel argued that the testimony on that issue did not prove the government's case, pointing out that the witnesses had testified that they had no knowledge of the defendant's intentions or specific activities and that the defendant himself emphatically denied any such intention. In addition, counsel for the defence provided a moral and political basis for the defendant's actions by setting forth the history of Indonesia's role in East Timor and the resulting international concern about it.

The emphasis of the defence, however, was a call for the Court to exercise internationally recognized principles of justice and democracy in a case which so manifestly required such an application. Arguing that articles 154 and 155 were not only outdated, but also at odds with the Universal Declaration of Human Rights which calls for the right to freedom of opinion and expression and to which Indonesia is a signatory, defence counsel concluded that the Court was bound to find the defendant not guilty.

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[44] As had counsel for Fernando, counsel for Virgilio tried unsuccessfully to convince representatives from the United Nations and from the Australian and Japanese embassies to testify on behalf of the defendant.

[45] *See , Pleidooi Atas Nama Terdakwa Virgilio da Silva Guterras"Perjalanan Penjang Mencari i Identitas Diri Malalui Pengakuan Hak-Hak Dagar"*, 2 Mei 1992.

Virgilio made a separate, emotional appeal to the Court.[46] Challenging the government's witnesses who testified as to the benefits of Indonesia's rule in East Timor, the defendant described the terror of the East Timorese in face of the Indonesian armed forces during the violent annexation and pacification of East Timor. He also described the ensuing years of political repression as the East Timorese struggled to exercise their internationally recognized right to self-determination. Claiming that his actions had not expressed hatred or hostility towards the government and offering the United Nations resolution of 1975 [47] as a justification for his actions, Virgilio explained that he had merely been attempting to urge the government to solve the problem in a fair and dignified manner in accordance with international law.

The Decision and Verdict.

Finding the defendant guilty under article 154, the Court found it unnecessary to consider the charges under article 155.[48] In imposing a sentence of two and a half years, rather than the three years sought by the government, the Court acknowledged the defendant's youth, his lack of a criminal record and his respectful attitude during the trial. Nevertheless, the court pointed out , the defendant refused to accept the integration of East Timor into Indonesia.

The Court found troubling the defendant's unwillingness to promise to discontinue his activities on behalf of East Timor and the fact that, although he claimed to have been "coerced" into becoming an Indonesian citizen, he had felt free to accept a scholarship for the university study available only to Indonesian citizens. Finding such a sentence reasonable, the Court concluded by explaining that the point of the punishment was not to exact revenge upon the defendant, but to assist in his rehabilitation.

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[46] *See, Pembelaan Terdakwa Virgilio da Silva Guterres.---"Betrayed But Not Beaten"*, 2 Mei 1992.

[47] UN Resolution 3485 (1975) called upon the Indonesian government to respect the "Inalienable right of the people of Portuguese East Timor to self-determination, freedom and independence" and to "find a solution by peaceful means."

[48] *See, Putusan, No. 20/IV/PID.B/1992/PN.JKT.PST.*, 19 Mei 1992.

4. Agapito Cardoso

The Government's Case

Like Virgilio, Agapito was accused of violating articles 154 and 155 of KUHP by participating in the Jakarta demonstration. The indictment [49] charged Agapito with:

1. Upon the instructions of Fernando, travelling to Jakarta to meet with Joao in order to join in a demonstration there, and to bring Joao Rp. 90,000 from Fernando to be used for the demonstration.

2. Having demonstrated in front of the missions of the United Nations, Japan and Australia in Jakarta on 19 November 1992 during which the Declaration, describing problems in East Timor and the need for international intervention, was delivered to the missions, and certain posters and a banner, drawing attention to the 12 November 1991 killings of unarmed civilians by Indonesian government troops, were displayed.

3. Attending meetings on 17 and 18 November in Jakarta where plans were made for the demonstration and during which the Declaration, posters and banner were prepared.

4. Making several of the posters which were displayed during the demonstration.

5. Signing the Declaration which was ultimately delivered to each of the foreign missions.

The prosecution presented the testimony of numerous witnesses to prove the charges against Agapito.[50] In addition, the government introduced the sworn statements of a variety of witnesses to show that

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[49] *See,* Surat Dakwaan Atas Nama Terdakwa Agapito Cardoso, Maret 1992.

[50] Interestingly, most of the testimony focused on the role played by Joao in organizing and leading the demonstration. Indeed, listening to the testimony and reading the summaries of it presented by the government and by the Court, one would have thought that Joao, rather than Agapito, was being tried.

Indonesia had "integrated" East Timor into the Republic at the request of the East Timorese people and that Indonesia's administration of that province had been a beneficial one. Therefore, concluded the prosecution, the Declaration and the posters carried by the demonstrators had misrepresented the facts, causing humiliation to the government.

The Defence

Counsel for the defence, throughout cross-examination, sought to establish the true extent of the defendant's participation in the demonstration. [51] While it acknowledged that Agapito made at least one of the posters, the defence pointed out that the defendant was merely copying slogans that had been formulated by someone else. The defence also established that the news of the killings in Dili on 12 November 1991 had profoundly shocked the defendant and that he had felt compelled to express his sorrow and anger over the deaths. Finally, the defence argued that articles 154 and 155 of KUHP were outdated and had no validity in a modern, democratic Indonesia.

As had all the other defendants before him, Agapito read a statement in his own defence.[52] He explained that his only purpose in participating in the Jakarta demonstration had been to express his anguish over the killings in Dili and that, at the most, he was guilty of youthful idealism. Expressing sympathy for those struggling to ensure the Right of the East Timorese to self-determination, the defendant explained that the United Nations itself endorsed that goal and that it was difficult to condemn those who had such support. Moreover, emphasizing that he, like the people of East Timor, desired a peaceful solution to the problems there, Agapito advised the Court that the demonstrators had not treated Indonesia as the enemy and had not intended to humiliate the government in any way. Finally, the defendant offered an apology to the government of Indonesia and to the people of Jakarta, and promised the Court that, in the future, he would work together with his Indonesian compatriots.

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[51] Counsel for Agapito accepted the indictment without filing any exceptions to it. For defence counsel's summation, *see* , *Pembelaan Terdakwa Agapito Cardoso*, 2 Mei 1992.

[52] *See Pembelaan Oleh Terdakwa Agapito Cardoso*, Mei 1992.

The Decision and Verdict

Examining the legislative history, as it were, of the "hate-sowing" articles, the Court held that they were, indeed, valid.[53] Based on the facts proved during the trial, the Court found the defendant guilty of violating article 154, concluding that it was therefore unnecessary to address the question of his guilt under article 155. Noting the defendant's youth and his lack of a criminal record, the Court held, however, that Agapito's activities had clearly lowered the level of respect and prestige Indonesia enjoyed in the eyes of the world, and that the defendant had ignored his responsibility to show respect toward the government. Accordingly, the Court reduced the one-year sentence sought by the prosecution to ten months, with credit for time served.

5. Dominggus Bareto

The Government's Case

Dominggus Bareto was also charged with violating articles 154 and 155 of KUHP for committing the following acts:

1. Having demonstrated in front of the missions of the United Nations, Japan and Australia in Jakarta on 19 November 1991 during which the Declaration describing the problems in East Timor and the need for international intervention was delivered to the missions, and certain posters and a banner, drawing attention to the 12 November 1991 killings of unarmed civilians by Indonesian government troops, were displayed.
2. Attending a meeting on 18 November 1991 in Jakarta where plans were made for the demonstration and during which the Declaration, posters and a banner were prepared.
3. Signing the Declaration.[54]

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[53] *See, Putusan, No. 19/IV/PID/B/1992/PN.JKT.PST.*, 21 Mei 1992.

[54] *See, Surat Dakwaan Atas Nama Terdakwa Dominggus Bareto*, Maret 1992.

The Defence

Dominggus, a law student, refused to be represented by counsel and acted on his own behalf. The observer attended only one of the sessions of the trial when testimony was heard. At that time, the Court appeared to assist the defendant in presenting his case by explaining to him that he could object to any of the prosecution's questions and pose questions of his own.

Judging by the testimony Dominggus gave in the cases of the other defendants, it is clear that he decided to throw himself upon the mercy of the Court by emphasizing that he was caught up in the emotion of the moment and merely followed the others. Dominggus also took pains to emphasize that he did not oppose integration and that he participated in the Jakarta demonstration to express his distress about the killings in Dili.

The observer was also present the day Dominggus responded to the prosecution's closing arguments. Dominggus had prepared a written defence to be read to the Court, but instead made a short statement in which he simply apologized to the Indonesian government and explained to the Court that he had no intention of humiliating the Indonesian government. The defendant also promised that he would never commit any such act again.

The Decision and Verdict.

The Court found Dominggus guilty [55] and imposed the six-month sentence sought by the prosecution. Given the date of his arrest and credit for time served, Dominggus was due to be released shortly after the Court rendered its decision.

Conclusions

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[55] The observer was unable to obtain any of the papers filed in the Dominggus' case other than the indictment. While the observer cannot state with certainty that Dominggus was convicted of violating only article 154, given the outcome in the other criminal cases, it was very likely to have been the case.

The proceedings against the five defendants were conducted in a fair and dignified manner and in accordance with the provisions of KUHAP. The judges maintained an atmosphere of decorum and were polite to all those appearing before them.[56] The prosecutors were generally professional and courteous to the defendants, the witnesses and the lawyers for the defence. Perhaps the one exception was the Chief Prosecutor trying Joao's case whose hostility toward the defendant and the others East Timorese witnesses was scarcely veiled.

For the most part, counsel for the defence appeared to have sufficient opportunity to present their cases without undue interference from the bench. Similarly, the prosecutors rarely objected to questions posed by the defence, permitting the lawyers to present their cases without numerous interruptions. There were, however, several occasions where the judges sustained prosecutors' objections to a particular line of questioning, such as that relating to the political justification for the defendants' acts. At other times, it was the judges themselves who exerted subtle pressure on counsel to shorten that particular line of questioning.

The observer concluded that the trials were basically conducted in an appropriate manner and, with one critical exception, in accordance with the due process provisions of the KUHAP. In several instances, the judges expressed impatience with extended questioning relating to the political issues from defence counsel, but, for the most part, they permitted the defence teams sufficient opportunity to present their cases.

Although KUHAP ostensibly provides certain safeguards, the protection is meaningless when a court declines to enforce these provisions. For example, following their arrests, at least two of the defendants made repeated requests for the assistance of counsel, requests that were denied

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[56] There was one episode where the customary courtesy failed and the Court managed to create an atmosphere of hostility and intimidation. When Joao appeared as a witness in the proceedings against Virgilio, the Chief Judge erupted when Joao claimed Portuguese, rather than Indonesian, citizenship. He repeatedly challenged Joao's testimony in a hostile manner. However, after this aggressive behavior was noted in the press, the Chief Judge was polite and restrained and maintained an atmosphere of decorum throughout the rest of the trial. Certainly, one feature of a system in which the Court actively questions witnesses is that it is difficult, perhaps even inadvisable, for the lawyers to object to questions from the bench.

by the investigating authorities. When counsel for the defence raised this issue at the commencement of the trial, pointing out that KUHAP guarantees the assistance of counsel where a capital crime is involved, the judges dismissed the claims. As a result, these defendants were deprived of their legal rights at the critically important time of interrogation.

Moreover, the trials have served to highlight the flaws inherent in the KUHAP itself. These failings include the absence of a defendant's right to remain silent. Not only were the defendants required to testify in the proceedings against each other, they were compelled to testify in their own trials as well. The observer cannot state conclusively that the testimony given by a particular defendant in another defendant's trial was used against the former in his own trial. Nevertheless, that such a possibility exists reflects the weakness of KUHAP and serves as a reminder that the due process protections provided by the Code must be expanded. The introduction into evidence of the statements of witnesses who were unable to attend the trials, as is permitted by KUHAP, further deprived the defendants of the critical right to confront or cross examine their accusers.

There was no direct evidence of governmental or military interference in the proceedings. It is difficult, therefore, to assess the impartiality of the judges. Certainly, during the proceedings themselves, the panels maintained an appearance of impartiality by permitting the defence teams to present their cases with a minimum of interference from the prosecution or the judges themselves. However, given the highly political nature of these cases, one may fairly question whether the judges were free to determine the cases entirely on their merits.

The patina of judicial due process cannot, however, be used to obscure the grim reality of the consequences of raising a voice in dissent in Indonesia with respect to the sensitive matter of East Timor. It must be emphasized that the very existence of the subversion and so-called "hate-sowing" laws, both of which are relics from the days of colonial oppression and less politically stable times, represents a serious violation of basic human rights. The vague language of each of the laws gives the government great latitude in bringing charges under them and provides the courts with ample leeway in finding defendants so charged guilty. Neither of the laws recognizes the possibility of responsible criticism or disapproval of governmental action or policy, but rather treats all such criticism as a malignancy that must be eliminated.

Whether or not one agrees with the aspirations of the East Timorese for an independent state is besides the point. The fact remains that the five East Timorese students in Jakarta were prosecuted for expressing their anguish over the deaths of their fellow citizens and for their efforts to remind the international community that the problems in East Timor have not yet been resolved. Admittedly, the judges showed some mercy in imposing sentences that were in part substantially less than the maximum. The trials and the guilty verdicts, taken together, reveal Indonesia's compulsion to eliminate dissent with respect to East Timor, whether that dissent is expressed to other Indonesians or to the outside world, even at the expense of the basic rights of its own citizens.

THE DILI TRIALS

Introduction

The trials of the Dili defendants began on 12 March 1991 with that of Francisco Mirando Branco followed by Gregorio Da Cunha Saldanha on 18 March. Both were charged with subversion. There were six other persons charged in proceedings arising out of the 12 November demonstration, all of whom were charged under articles 154 and 155 of the KUHP. They were Carlos dos Santos Lemos, Bonafacio Magno, Juvencio de Jesus Martins, Filomeno da Silva Pereira, Saturnino da Costa Belo and Jacinto des Neves Raimundo Alves.

The indictments against both Francisco and Gregorio were similar. The charge alleges that both were members of the clandestine organization known as the Executive Committee (Comité Exécutif, CE) of the CNRM,[57] led by Xanana Gusmao, the political motives of which were opposition to the integration of East Timor with Indonesia.

It was charged that between June and November 1991 meetings took place at Francisco's home in Dili and other places, the agenda of which was to achieve Independence for East Timor by holding meetings and through demonstrations or petitions whenever foreign guests visited East Timor.

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[57] Concelho Nacional De Resistencia Maubere (National Council of the Maubere Resistance).

On 6 July 1991, a meeting took place at the house of Carlos when the possible visit of the Portuguese parliamentary delegation to East Timor was discussed. In August 1991, a further meeting was convened at which the Executive Committee was formed in order to organize a demonstration for the benefit of the Portuguese parliamentary delegation which was to visit East Timor. The organizational structure of the CE was arranged with Francisco as head of documentation and analysis and Gregorio responsible for youth agitation, mobilization and propaganda.

It was alleged that a communication network should be formed between Dili, Denpasar, Australia and Portugal which was to be coordinated by Fernando in Denpasar. It was further decided to report to CNRM of the decisions of the meeting and to advise Xanana of its existence.

In September 1991 at the home of Jacinto, a further meeting took place at which was discussed the visit of an English television crew whose programme was to include interviews with Timorese youth, members of the resistance forces and "certain respected figures who are anti-integration".[58] The television programme would be broadcast to attract the support of certain countries for the struggle for independence.

More particular arrangements for the demonstration were discussed at a meeting on 26 October 1991, including such details as the preparation of the petition to be given to the Portuguese parliamentary delegation; making banners containing slogans such as "Xanana Gusmao, Symbol of national unity" and FRETILIN and UDT Flags.

Gregorio, in his capacity as head of youth mobilization, was given the task of coordinator and overseer of the demonstration and was to organize the youth and banners and flags.

On 7 November 1991, a further meeting discussed the cancellation of the parliamentary delegation visit and made a decision to change all the arrangements to coincide with the planned visit of the United Nations Commission on Human Rights Special Rapporteur on Torture.

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[58] A reference, undoubtedly, to Governor Carrascalao, Governor of East Timor, and Bishop Belo.

The indictment then went on to accuse Francisco of making a banner with a picture of Xanana and a flag representing a fusion of the UDT and FRETILIN flags. He was also accused of taking newspaper clippings from Portuguese newspapers containing political news concerning the struggle for the solution of the East Timor problem, translating them into the local language (Tetum) and distributing them to CE members at the meetings. He gave his own explanation as to the meaning and contents of the materials "with the aim of extending and deepening the CE members' conviction that the struggle to break East Timor away from Indonesia would definitely succeed."

On 9 November 199, Constantio wrote to Juvencio requesting him to check if there would be a mass at the Motael church on 12 November and if the human rights envoy was definitely coming to Dili so that these events could be used to hold a demonstration following the mass.

On 8 November 1991 Gregorio received a letter from Mahudu, a contact of FRETILIN, "containing a directive that the demonstration should make use of the mass and flower laying ceremony for the soul of Sebastiao[59] who died on 28 October."

The indictment then detailed the events which, according to the prosecution, took place on 12 November 1991.

At about 7.15 a.m. Gregorio ordered lines of people to move toward the Santa Cruz cemetery. They shouted "Viva Fretlin" "Viva Xanana Gusmao", and flew flags and banners upon which were depicted the portrait of Xanana, and statements such as "Tears and bloodshed are the suffering of the people of East Timor since 1975" and another which read "Almighty God, save us as you did Daniel, from the mouth of the Indonesian Lion."

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[59] Sebastio Gomes Rangel, a young Timorese man killed on 28 October 1991 when security forces attacked the Motael parish church where he and a number of Timorese had taken refuge.

At about 7:20 a.m. near the Governor's office, the demonstrators attacked a security officer resulting in two persons being "hospitalized for more than a week due to serious wounds from sharp weapons and rocks." At the time the demonstrators were heard to shout "Kill the Javanese".

When the demonstrators reached the cemetery, a group of them climbed on top of the walls holding flags and banners and yelling slogans. They allegedly became wild and started "attacking security officers, brandishing sharp weapons and threatening: 'Watch out or we'll bury you along with your friends over there' (while pointing in the direction of the military cemetery opposite); 'Don't worry, ABRI wouldn't dare to shoot, their guns are empty, they've got no bullets' and 'ABRI is bad, get lost!', while trying to grab officers' weapons".

The indictment claims that the accusations as outlined fulfil the criteria of criminal activity as regulated by the anti-subversion law 11/PNPS/1963. In addition, the matters charged constitute offences under paragraphs 154 and 155 of the KUHP.[60]

Gregorio Da Cunha Saldanha's Defence

In his defence statement which was delivered to the Court on 26 May 1992, Gregorio recounted events in East Timor since 1975 and referred particularly to the destruction of many sacred and special places in East Timor by the ABRI since the time of the invasion. He went on to claim that INTEL agents had infiltrated the East Timorese community to "divide and rule" and this had led to attacks on homes by "Ninja" squads. One of these so called Ninja squad attacks was on the Motael church on 28 October 1991.

Gregorio said that many of the things which had happened which involved desecration of sacred sites and of churches had never occurred during the 500 years of Portuguese colonial rule nor indeed even during the Japanese occupation during the second World War.

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[60] From an English translation of the indictment against Francisco Mirando Branca, Dili, February 1992, prepared by the prosecution.

He admitted that the development of East Timor during the 16 years since integration had improved. New buildings and roads for example were welcome but if these were devices to compensate for the loss of self-esteem and dignity then they were rejected.

Gregorio referred to an interview which Brigadier General Warouw gave to ABC (Australian Broadcasting Corporation) on 15 October 1991 in which he said:

> "During the visit of the Portuguese Parliamentary Delegation to East Timor, safety is guaranteed for whoever wishes to demonstrate, as long as they do not disturb the general safety and order."

The anti-integration youth took comfort in those words, according to Gregorio, but "Whatever we do, we are seen as security disturbers and communists."

Gregorio admitted to being a member of the CE which was intended to serve as a mediator to express the aspirations of the CNRM. those aspirations which are to conclude a peaceful resolution of the East Timor issue through open dialogue with the Portuguese Parliamentary Delegation. In other words, the CE was intended to speak for Xanana Gusmao.

Gregorio admitted being the head of the CRNJR (Resistance Committee for Timorese Youth). He made the significant admission that although freedom for East Timor is what is sought, the CRNJR would accept the decision of the East Timorese people because "We are well aware that there are other choices and we will accept the result of a referendum so long as it is done in a free, fair and democratic setting."

Gregorio then dealt with the events involving his arrest and detention. He claimed to have been continually interrogated and was tortured by having his facial hair and moustache pulled out. He was hit by the deputy police chief in the presence of the prosecutors and was forced to divulge the name of churchmen, civil servants and business people by whom he was accused of being supported. Because he was still suffering from his gun-shot wounds, he says he gave the names of people with whom he, in fact, had no connection.

On a later occasion, Gregorio was interrogated and forced to admit that weapons and firearms were carried by the demonstrators on 12 November. He was assured that if he admitted to those things he would be treated lightly. However, he refused to do so because he claimed it was not true.

He was advised by the public prosecutor, Supardi that in order to avoid conflict between the Jakarta and Dili lawyers it would be better to choose Ponco Atmono, a local Dili lawyer. If Gregorio chose the LBH lawyers, he would suffer the consequences. This was repeated by Police Lieutenant Bambang . Gregorio remained silent but in his address to the Court said: "a heavy weight which I bring to this Court which is that a life sentence may result".[61] At the opening stages of the trials, both Francisco and Gregorio stated that they wished the lawyers from the LBH to appear for them. The Judges initially took the view that a local lawyer from Dili should handle the cases and rejected the LBH team on a technical ground. The matter was, however, resolved and the LBH lawyers were allowed to appear before the court.

While at the hospital recovering from his gunshot wounds, Lieutenant Edy of SGI (Dili Intelligence Group) showed him a photograph of a youth named Ajenuno whom Lieutenant Edy identified also belonging to SGI. The photograph depicted Ajenuno holding a banner and posing at the northern wall of the cemetery at the time of the demonstration.

At the time there were also three wounded persons at the hospital known personally to Gregorio to be members of INTEL. He also claimed that he saw a number of youths during the course of the demonstration, which he was leading, who did not respond to his command to be controlled and who were not known to him or to his associates. The conclusion, he said, is that INTEL put their agents in the demonstration to incite the demonstrators so that there would be a reaction from the security forces.

Gregorio went on to say that he had been informed at the end of November 1991 by Colonel Purwanto, Assistant, INTEL, in the interrogation room of POLWIL (Polisi Wilaya, regional police force) that Constantio was also one of their agents. This claim was repeated during a meeting which took place later with Major-General Sintong Panjaitan (then Military Commander of the Region) with the Chief of Police of East Timor also present.

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[61] It appears Gregorio was threatened that if he insisted on being represented by the LBH lawyers from Jakarta he would risk a life sentence - which is what he actually received from the Court.

He inferred from what he had been told and what he had observed that "the INTEL purposely infiltrated their agents into our side to influence us and to incite the demonstrators to take actions which would invite a reaction from the security forces, such as occurred at the demonstration of 12 November. It is clear that if the demonstrators had any firearms or knives or fired any shots, then this was a pre-arranged plan by INTEL".

Gregorio went on to discuss the events of the demonstration itself on 12 November, in the course of dealing with allegations of witnesses who had already given evidence against him. He referred to the fact that witnesses had seen him carrying a megaphone and he explained that he did so for only part of the way. When he got to the cemetery he got up on the wall, and asked everyone to be quiet and to enter the cemetery to pray.

He claimed that he would not have allowed firearms if he had known that there were any in the crowd. A witness said that he heard shots from the demonstrators after a warning shot from the military but Gregorio denied that that occurred. He asked rhetorically "Where are the dead or injured from the military?"

He also denied that he was collaborating with another group which had been referred to by the witnesses known as FITUN. He admitted, however, to being involved in organizing the demonstration and preparing banners and flags, but claimed that he had no provocative intent and that the demonstration was planned to be peaceful.

Gregorio claimed that he had received a letter from Constantio just before 12 November directing him to contact the youth for the demonstration, which was part of his responsibility to the CE.

The Missing Defendant

One of the persons central to the planning and organizational arrangements for both the Dili and the Jakarta demonstrations was Constantio Pinto.

It was with Constantio that meetings took place in Dili, since mid-1991, in order to prepare for the visit of the Portuguese parliamentary delegation. It was Constantio who was alleged to be the head of the CE and therefore very high in the chain of command which led to the resistance leader himself, Xanana Gusmao.

Constantio, aged about 30, is reported to have two children. In early 1991, he was a teacher at the Sao Jose Catholic School in Dili.

It appears that on 25 January 1991 he was detained by INTEL. The ICJ received information that he had been detained on a random check while riding his bicycle and was found to have politically sensitive papers on him. At the time, grave fears were held for his safety.

Constantio was referred to in an article in the *Melbourne Age* of 11 February 1991. He was identified as one of at least two FRETILIN members who had arranged an ABC interview with Xanana in September 1990. It was reported that Constantio was interrogated for three days after his arrest on 25 January and that he feared for his life.

The charge in Joao's case states that on 26 October 1991 the defendant met with Fernando and others to organize a reception or contact for the Portuguese mission. At that meeting Fernando gave Joao's instructions which had been received from Constantio to the effect that there would be a demonstration either in Dili or Jakarta and that its organization in Jakarta was entrusted to Joao and in Dili to Constantio.

On 9 November, Constantio sent a letter to Juvencio, ordering him to verify if there would be a mass at the Motael church on 12 November and if the UN Human Rights envoy was definitely coming so that these events could be used to hold a demonstration following the mass.

On 10 November, according to the indictment in Gregorio's case, Constantio as head of the CE sent a written directive to Gregorio to proceed with the demonstration in Dili on 12 November after the mass at the Motael church.

The Joao's indictment goes on to recall that on 12 November 1991 Constantio telephoned Fernando to inform him of the incident in Dili and instruct him to inform foreign embassies, the foreign press, ACFOA (Australian Council for Overseas Aid) and Amnesty International. It was also noted later that the demonstration which occurred in Jakarta on 19 November (which lead to the arrest and eventual conviction of most of those involved in RENETIL in Bali and Jakarta) and which was under the leadership of the defendant Joao, was held in accordance with the instructions received from and provided by Constantio.

In Gregorio's defence, an incident was referred to which occurred after the demonstration. Gregorio claims to have been told by Colonel Purwanto of INTEL that Constantio was one of their agents, on two occasions, the second being in the presence of Major-General Panjaitan and the Chief of the East Timor police.

Here then is a person whose involvement in the planning of both demonstrations was pivotal, whose evidence and version of events would presumably have been vital both to the prosecution and to the defence, but of whom nothing is seen or heard at the trials either in Dili or in Jakarta. He gave no evidence as a witness at any of the trials. He was not charged with any offence. On the basis of the evidence and the charges brought against the defendants, it is startling to discover that he has not been charged at all and it is said that he is in hiding.

In the defence of Gregorio Saldanha a part of the document is devoted to the relationship between the CRNJR, the CE and the CNRM. The point was made that the prosecution had sought to prove that Gregorio had been ordered to stir up the youth for the demonstration which was carried out on the orders of the CNRM.

However, it was Constantio who insisted that the form of the CE had to be agreed to by the CNRM headed by Xanana Gusmao and yet Constantio was not brought to the trial as a witness. All that was proven therefore was that the CE and the CNRM had common goals but only Constantio has claimed that orders came from Xanana Gusmao.

Later in the defence document the question is asked rhetorically: who is responsible for the events of 12 November? The following alleged facts were noted: That Constatio:

- initiated the formation of CE;
- was present at five out of the six CE meetings;
- always headed the CE meetings;
- a meeting did not take place if he did not attend;
- raised funds;
- contacted other groups;
- issued many of the directives for the CE meetings;
- directed the protest to take place to coincide with the visit of the Portuguese parliamentary delegation and later directed it to coincide with the visit of the UN delegate.
- the point was made that the whereabouts of Constantio are unknown and yet in fact all those on trial had followed his leadership and orders.

The UN Commission on Human Rights

At the last session of the UN Commission on Human Rights in 1992, the Commission issued a consensus statement on 5 March 1992 which expressed "serious concern" over the human rights situation in East Timor and "strongly deplored" the violent incident in Dili on 12 November 1991. The Commission also urged the Indonesian authorities to "facilitate access to East Timor for additional humanitarian organizations and for human rights organizations".

Difficulties for the Observers

The ICJ observer, Rodney Lewis, had difficulty in obtaining permission to travel to East Timor. Justice Xavier Connor (retired), who was to observe the concluding stages of the subversion trials in Dili on behalf of the ICJ, had his visa application denied on the basis that by the time the authorities had dealt with it, the trials would have been concluded.

The province of East Timor is alleged by the Indonesian government to be an open province, i.e., it is assumed that there are no restrictions on travel between any Indonesian province and East Timor. KUHAP provides that trials are open to the public, which one would have thought to mean that entry to the Court would not be hindered. Indeed, the ICJ observer obtained permission from the deputy Chief Judge before the trial to attend. On the morning of the trial, however, the entrance to the Court was blocked by about a dozen armed troops who indicated it was necessary to obtain permission of the Military Commander at the local Dili Military Command Headquarters. Although permission was readily forthcoming from the Commandant , the need to request permission was an evident breach of the law regarding access to the court. It was perfectly clear that any attempt by the public to attend the court sessions would have been met with intimidation and a direct inquiry about one's interest in the matter.

The government of Indonesia, in the experience of the two observers mentioned above, has not complied with the spirit or the letter of the chairman's statement made at the UN Human Rights Commission on 5 March 1992.

THE MILITARY TRIALS

The courts martial set up by the Indonesian Military as a response to the matters arising out of the 12 November incident took place at Denpasar, Bali from 29 May to 6 June 1992. There was little advance warning of the trials and, in the words of a member of the panel of judges: "The thing is, the incident happened some time ago so things were speeded up."

As a result of the haste with which the military trials were conducted, they were concluded in the absence of international observers.

According to Army Chief of Staff General Edi Sudradjat, those men and officers committed command mistakes in the field, violating military ethics and discipline tending towards criminal offences. They were charged under article 103, paragraph 1, of the Military Criminal Code for disobeying orders.

The military defendant who has attracted the most attention is Second Lieutenant S. Mursanib who led a joint forces team of troops known as Dakhura (one BRIMOB platoon and two infantry batallion 303 platoons). He said that he had been instructed to monitor, follow and report the movements of the demonstrators to the Kodim District Military Commander, infantry Colonel Wahyu Hidayat.[62]

Mursanib told the Court that on receiving the order to follow the demonstrators, he quickly led his troops out of the Kodim Headquarters. He did not even have time to put on full army dress. He was in constant contact with Sector C Commander Colonel Binsar Aruan. When he reached the corner near the Santa Cruz Cemetery he saw that the mass of people were "already out of control". He moved the infantry 303 troops to the front but said the first order to shoot the demonstrators did not come from him.

His troops heard firing from the main gate of the cemetery and he said "There were unidentified troops. I only heard the shooting."

On hearing the shooting, Mursanib's troops joined in and "attacked". The two platoons fired not fewer than 90 bullets but more bullets were fired from Company A and the irregular ("unidentified") troops. Even after demonstrators had fallen to the ground those "irregulars" continued to fire.

On 27 February 1992, General Sudradjat announced the findings of the Honorary Military Council which had been directed to look into the affair from the military viewpoint. It was announced that action had already been taken against six senior officers of whom three had been dismissed from the armed forces, two removed from active duty and one temporarily removed from active duty.

No charges were specified other than the general finding that these officers were responsible for intelligence and security and it was therefore their responsibility to take action to forestall the demonstration.

There were a further five unnamed officers mentioned in the report who were investigated on 20 March 1992 by a team from armed forces headquarters. Of these five officers, according to *Tempo* magazine, one was deemed not to have performed his duty in a fitting way and it was recommended that he be pensioned at the youngest permissible age. Three others were deemed to have responded as their duties required though they failed to do so optimally and they were to be returned to their units and given further guidance. The fifth officer was deemed to have acted optimally in the performance of his duties.

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[62] *Editor* magazine, "Mursanib: 14 months for shooting demonstrators".13 June 1992, Denpasar; from the Pegasus database, Maryland, USA.

Thus the trials which actually took place in Denpasar in May/June were those of lower ranking military personnel.The details of those persons and their offences and sentences are listed below:

NAME	SENTENCE
2nd PRIVATE MATEUS MAYA	8 months on 30 May 1992 for disobeying orders He and Pvt. Alfonso de Jesus fired guns from their vehicle while taking Gerhan Lantara, a wounded officer, to hospital.
2nd PRIVATE ALFONSO DE JESUS	8 months on 30 May 1992 for disobeying orders.
1st CORPORAL (POLICE) I.P. MARTHIN ALAU	1 year 5 months for assault , in violation of article 351 of the criminal Code (which carries a maximum sentence of five years in jail) for cutting off the ear of an East Timorese demonstrator, Simplicio Celestino de Deus (age 20)
1st SERGEANT ALOYSIUS RANI	1 year 6 months on 3 June 1992 for shooting into the crowd without orders to do so.
1st SERGEANT UDIN SYUKUR	1 year 6 months on 3 June.
1st SERGEANT PETRUS SAUL MADA	1 year on 3 June
2nd LIEUTENANT SUGIMAN MURSANIB	Sentenced on 3 June to 1 year two months for failing to control his troops. Mursanib gave the order to two platoons of Battalion 303 to "Advance!" (Maju!) in front of a police mobile brigade battalion, causing confusion.

2nd LIEUTENANT JOHN ARITONANG	1 year on 3 June for opening fire on demonstrators without orders to do so. A platoon leader (Battalion 303).
2nd LIEUTENANT HANDRIANUS EDDY SUNARYO	1 year on 5 June for ordering his platoon (Battalion 303) to fire on demonstrators without permission from his superiors.
2nd.LIEUTENANT YOHANES ALEXANDER PANPADA	8 months for disobeying orders but denied firing on demonstrators. He is the deputy intelligence officer at the local Resort Military Command (KOREM 164).

The National Commission of Inquiry in its report referred to the troops who "...a spontaneous reaction took place among security personnel to defend themselves, without command, resulting in excessive shooting at the demonstrators, causing deaths and injuries. At the same time, another group of unorganized security personnel, acting outside any control or command, also fired shots and committed beatings, causing more casualties".

A more precise description of homicide in one degree or other and serious assault would be difficult to imagine. The evidence was that if the demonstrators possessed weapons at all (a claim which is by no means clear), they were sticks and stones. It is reasonably clear from the evidence available at the trials (and absolutely clear from the evidence of the Westerners who were eye-witnesses) that the demonstrators had no firearms. Self-defence seems, on the available evidence, a completely inappropriate rationale for the behaviour of the troops, who were in any event seen to be continuing their assault long after the first or opening burst of gunfire.

The reference to "excessive shooting" and to "unorganized security personnel, acting outside any control or command" appears conclusive of the issue that both homicide and serious assault have taken place on the part of security forces. The charges involving disobeying orders are, therefore, patently absurd.

The dismissals of the military officers and the disciplinary action, dealt with by court martial, have not been explained fully and the reasons for them should be made public. In particular, if any of those disciplined were also guilty of criminal offences, they ought also to be charged.

Charges against the military personnel were inappropriate in so far as they only referred to a failure to follow or obey orders. The issue of whether or not orders were followed or disobeyed is not, of course, the point. On the government's own account 50 persons were killed and many dozens were injured by gunfire. It was clearly not beyond the writ of the National Commission of Inquiry, much less the prosecution and law authorities, to determine, from the evidence and from statements of all of those involved, the identity of the persons who fired the fatal shots and their victims. In many cases, ballistic evidence would have been sufficient to connect bullets with weapons. Clearly these methods were not followed in the case of the National Commission of Inquiry, or the Military Honour Council which brought the military charges to the court in Denpasar.

The appropriate charge to be brought against those responsible is and should be laid not only against those military personnel who were responsible for firing the fatal shots but also against those in whose charge or under whose control those shots were fired. Most importantly, issues such as the question of whether the incident was pre-meditated on the part of the military and whether it was connected to any of the personnel or any of the activity which, for example, took place at the Motael church on 28 October 1991, should be thoroughly investigated. In other words, the trail of investigation must be exhaustive and must definitively remove any possibility that conspiracy may have been involved and that the incident, as may be inferred from some of the evidence provided by the foreign observers, was not only an example of sustained firing on the part of the troops, but also one which was planned before those troops actually arrived at the Santa Cruz Cemetery.

THE VERDICTS COMPARED

For the purpose of facilitating a balanced assessment of the manner in which the rule of law in Indonesia has been applied to its citizens, on the one hand in the ABRI or military forces, and on the other, to citizens of East

Timor, it is necessary to refer to the outcomes of the trials which took place in Dili and in Jakarta.

Jakarta Defendants:

NAME	PROSECUTION REQUEST	SENTENCE
FERNANDO DE ARAUJO (26)	15 years	9 years appeal
JOAO FREITAS DA CAMARA (36)	13 years	10 years appeal
VIRGILIO DA SILVA GUTTERAS(28)	3 years	2 years, 6 months appeal
AGAPITO CARDOSO (25)	1 year	10 months appeal
DOMINGGUS BARETO (29)	6 months	6 months no appeal

Dili Defendants

NAME	PROSECUTION REQUEST	SENTENCE
GREGORIO DA CUNHA SALDANHA (29)	Life imprisonment	Life Imprisonment appeal
FRANCISCO MIRANDO BRANCO (41)	15 years	15 years appeal
JACINTO DES NEVES RAIMUNDO ALVES (34)	8 years	8 years appeal
FILOMENO DA SILVA PEREIRA (34)	8 years	5 years 8 months appeal
JUVENCIO DE JESUS MARTINS (30)	10 years	6 years 10 months appeal
CARLOS DOS SANTOS LEMOS (31)	10 years	10 years appeal
BONAFACIO MAGNO	7 years	6 years appeal
SATURNINO da COSTA BELO	10 years	9 years appeal

The charges brought against the military officers and personnel subsequent to the 12 November incident are patently inappropriate to the crimes involved. Moreover, the seriousness of the charges, not to mention the sentences, does not bear any comparison with the charges and sentences brought against the demonstrators and those who organized the demonstrations. It may fairly be said that "Justice" has been turned on its head in this case.

THE ANTI-SUBVERSION LAW

The Anti-Subversion Law 1963 has been the authority for many prosecutions in Indonesia and the prescribed penalty for breach for some of its provisions is imprisonment for a maximum of 20 years, imprisonment for life and also includes the possibility of a death sentence.[63]

The late Yap Thiam Hien, a highly respected and courageous human rights lawyer and member of the ICJ, was once quoted as saying that "the Anti-Subversion Law is so wide and its interpretation so broad, that everybody can be affected. Some people even say that breathing is subversive."

The Anti-Subversion Law is quite inappropriate to a State which claims to be based upon the rule of law, and which seeks to play a full role in the deliberations and membership obligations of the United Nations. Any law which places the life of the accused person in jeopardy of the death sentence should by all reasonable standards of law and humanity be clear and concise so that the charge under which a person is tried, may be capable of being clearly defined. This is patently not the case for the Anti-Subversion law.

In the course of the trials, arguments were put forward in relation to the validity of the Anti-Subversion Law.

It was argued that the Anti-Subversion Law clearly referred to people who were against the confrontation campaign during the Sukarno period and it must be seen against the political vacuum of the decree of 5 July 1959 which established the period of "guided democracy".

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[63] ICJ Study, *Indonesia and the Rule of Law*, 1987, p 85.

In any event, paragraph 12 of 36/PNPS/KOTI/1964 declared that all previous decrees concerning subversion were no longer valid and it established an operational command to deal with subversion. In other words, the Anti-Subversion Law was thereby rescinded.

The 1966 decision of the Majelis Permusyawaratan Rakyat (MPR)[64] (1966 MPR Tap (decision) No. 19 and No. 34 of 1967 and No. 38 of 1966) required and directed the New Order government to correct the constitutionality of laws and ensure that they conformed to the 1945 Constitution and the Pancasila. It therefore followed, according to the defence team, that law No. 5 of 1969 which reintroduced and confirmed the Anti-Subversion Law should be viewed as invalid because it was outdated. It was by Law 5/1969 that the Anti-Subversion Law of 1963 was reintroduced, explaining that it now had the force of law without any change in its wording.

It was claimed not to be in accordance with the Pancasila and contradicts paragraph 28 of the 1945 Constitution, which provides that freedom of association and assembly, of expressing thoughts and of issuing writing and the like shall be prescribed by statute.

Any law which puts the life of an accused person in jeopardy of the death sentence must also, in all reason, leave no doubt about the validity of its existence so that it can at least be said of it that it is the deliberate product of social policy prevailing at the time, in strict accordance with the rules which it has set for itself. This is not the case with the Anti-Subversion Law as its validity is in question and the constitutional doubts which have been cast upon it, not only in these trials but in previous trials, leave any fair-minded observer in serious doubt as to whether or not it actually constitutes a valid law of the Republic of Indonesia.

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[64] Majelis Permusyawaratan Rakyat, the assembly with the highest policy-making authority under the Constitution, is empowered to determine the guidelines of the policy of the State.

INTERNATIONAL HUMAN RIGHTS ISSUES

Indonesia, as a member state of the United Nations, has pledged to achieve in cooperation with the United Nations, the promotion of universal respect and observance of human rights and fundamental freedoms.[65]

Indonesia has breached article 19 [66] of the Universal Declaration of Human Rights in permitting prosecutions under the Anti-Subversion Law against defendants whose crime involved no element of violence but who held opinions and who sought to express their opinions and to receive and impart information and ideas in relation to the self-determination of East Timor.

Indonesia has breached article 20 [67] of the Universal Declaration of Human Rights in permitting prosecutions under the Anti-Subversion Law against persons who sought to arrange a peaceful demonstration and who engaged in meeting and planning for those demonstrations. The fact that the demonstrations produced some element of violence (in Dili, the violence was clearly, on the evidence available, offered on the part of the military) does not appear to have been the fault nor the intention of the defendants.

RECOMMENDATIONS

1. That the Government of the Republic of Indonesia release the full report of the National Commission of Inquiry together with the full records of interviews and inquiries made by members of the Commission pursuant to their official duties.

2. That further Commission be established by the President of the Republic of Indonesia to conduct a full inquiry in accordance with the Principles on the

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[65] Preamble to the Universal Declaration on Human Rights.

[66] Article 19: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

[67] Article 20: "Everyone has the right to freedom of peaceful assembly and association".

Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions[68] in relation to the following:

(a)The whole of the circumstances surrounding the organizing, planning, holding of and the aftermath to the demonstrations, both in Dili and Jakarta.

(b) A special brief to inquire into the involvement of the ABRI and its military intelligence personnel.

(c) To seek out and question Constantio Pinto concerning his involvement in the affair and to guarantee his safety.

3. That the Government of the Republic of Indonesia repeal the Anti-Subversion Law 11/PNPS/1963 and establish a commission of properly qualified persons to suggest a draft law to put in its place requiring actual or threatened violence as an essential element in the offence.

4. That in the meantime the Government of the Republic of Indonesia direct that the appropriate and relevant prosecution authorities investigate and, if appropriate, bring charges of homicide against all ABRI personnel involved in the "excessive shooting" and those who "acted without command" together with all those directly or indirectly responsible for those actions and of subversion against all ABRI personnel implicated in the planning, preparation and carrying out of the demonstrations in both Dili and Jakarta, such charges to be in accordance with the findings of the National Commission of Inquiry and in accordance with the provisions of 11/PNPS/1963.

5. That the President of the Republic of Indonesia establish a commission of legal experts to inquire into and to recommend amendments to the Criminal Procedure Code (KUHAP) with special emphasis on the means by which its provisions may be enforced and to ensure its strict observance and in particular:

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[68] In 1989, the United Nations Economic and Social Council established Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions to effectively investigate situations such as that which occurred on 12 November 1991 in Dili.

(a) Extend jurisdiction for the civilian courts to offences committed by members of the ABRI (including the Police).[69]

(b) That a person not be compelled to give self-incriminating evidence whether as a defendant in his own trial or as witness in the trial of another, and consequently that the right to remain silent be confirmed.

(c) That legal sanctions be provided against breach of interrogation and detention procedures, such as the exclusion of evidence at trial.

(d) That the trial judge be directed to ascertain the truth or otherwise of allegations of pressure, ill-treatment or torture when raised by a defendant in the course of a trial and to oblige the judge to make a finding in respect of that allegation.

(e) Provision should be made for police to inform the defendant's lawyer when the defendant is to be interrogated.

(f) Establish the right of the defence to present the report of a defence expert to counter the evidence of a prosecution expert.

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[69] *See* , report of the Special Rapporteur on Torture to the UN Commission on Human Rights, 8 January 1992, E/CN4/1992/17/Add. 1, paragraph 80 (k).